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NO.

In The
Supreme Court of the United States
October Term, 1995

Fort Peck Assiniboine and Sioux Tribes
Petitioner,

v.

Leslie Scarlotte Tubridy and Patrick Tubridy
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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January 1996

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QUESTION PRESENTED

Whether the terms of the Indian Child Welfare Act and this Court's Decision in *Mississippi Bank of Choctaw Indians v. Holyfield*, 409 U.S. 30 (1989) preclude a State Court from applying State laws pertaining to abandonment in order to determine a child's domicile under the Indian Child Welfare Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
OPINION BELOW 1
JURISDICTION 1
STATUTE INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 6

1. THE RULING BY THE ILLINOIS SUPREME COURT UNDERMINES JURISDICTIONAL GUARANTEES TO THE TRIBES, GRANTED BY CONGRESS UNDER THE INDIAN CHILD WELFARE ACT, IN CONFLICT WITH THE DECISION OF THIS COURT IN *MISSISSIPPI BAND OF CHOCTAW INDIANS V. HOLYFIELD* 6

2. REVIEW OF THIS CASE IS PARTICULARLY NECESSARY BECAUSE THE INDIAN CHILD WELFARE ACT IS BEING SERIOUSLY ERODED BY STATE COURTS APPLYING EXCEPTIONS TO FEDERAL LAW CONTRARY TO THIS COURT'S DECISION IN *HOLYFIELD* AND TO

THE PROTECTIONS FOR TRIBAL JURISDICTION CONGRESS HAS ENACTED.....14

CONCLUSION.....18

APPENDIX
Opinion of Illinois Supreme Court.....A
Opinion of the Appellate Court of Illinois Second District.....B
Circuit Court Order.....C
Tribes' Motion to Transfer Jurisdiction.....D
Iron Bear's Motion to Transfer Jurisdiction.....E
Transcript of Circuit Court 16th Judicial District, Kane County Illinois.....F

TABLE OF AUTHORITIES

Cases: Page

Clark v. Jelinek,
414 P. 2d 892 (Idaho 1966).....12

In re Adoption of a Child of Indian Heritage,
111 N.J. 155, 543 A. 2d 925 (1988).....15

In re Adoption of Baby Boy L.,
231 Kan. 199, 643 P. 2d 168(1982).....14

In re Adoption of Halloway ,
732 P. 2d 962 (Utah 1986).....9,13

In re Adoption of Infant Boy Crews,
118 Wash. 2d 561, 825 P. 2d 305 (1992).....14

In re S.C., 833 P.2d 1249 (Okla. 1992).....14

In re Skinner's Guardianship,
230 Iowa 1016, 300 N.W. 2d. 1 (1941).....12

In re Termination of Parental Rights of D.S.. (*In re Adoption of T.R.M.*), 525 N.E. 2d 298 (Ind 1988), cert. denied, 490 U.S. 1069 (1989).....14

Mississippi Band of Choctaw Indians v. Holyfield , 490 U.S. 30 (1989).....passim

Oneida Indian Nation v. County of Oneida,
414 U.S. 661 (1974).....16

Peacock v. Bradshaw,
194 S.W. 2d. 551 (Texas 1946).....12

People ex rel. Noonan v. Wingate,
376 Ill. 244, 33 N.E. 2d 467 (1941).....12

Ramah Navajo School Board v. New Mexico Bureau of Revenue, 458 U.S. 832 (1982) 16

Re, Thorne, 240 N.Y. 444, 148 N.E. 630, *reh denied,* 241 N.Y. 513, 150 N.E. 534 (1925).....12

Washington v. Washington State Commercial Fishing Vessel Ass'n, 443 U.S. 658 (1979) 16

Law Review Articles: Page

Baron, The Resurgence of the "Tribal Interest" in Indian Child Custody Proceedings, 26 Tulsa L.J. 315, (1991).....15

Carriere, Representing the Native American: Culture, Jurisdiction and the Indian Child Welfare Act, 79 Iowa L. Rev. 585, (1994).....15

Comment, The Indian Child Welfare Act of 1978: Protecting Essential Tribal Interests, 60 U. Colo. L. Rev. 131 (1989).....16

Dale, State Court Jurisdiction under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test, 27 Gonzaga L. Rev. 353, 375-395 (1991-92).....15

Davis, *The Existing Indian Family Exception to The Indian Child Welfare Act*, 69 North Dakota Law Review 465 (1993).....15

Note, The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child? 38 Cath. U.L. Rev. 511, 533-538 (1989).....15

Note, When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in the Indian Child Welfare Act Adoptive Placements, 79 Minn. L. Rev. 1167 (1995).....15

Statutes Page

25 Am. Jur. 2d. §67, citing, ... 12

25 U.S.C. §1901 6,9

25 U.S.C. §1911 (1978) 10

25 U.S.C. §1911(a) (1978) ..... passim

25 U.S.C. §1911(b) 3,7

28 U.S.C. §1257(a) 1

25 U.S.C. §1912 8

25 U.S.C. § 1912(e) 8

25 U.S.C. §1912(f) 8

25 U.S.C. §1915 8

25 U.S.C. §1913 8

25. U.S.C. §1914 8

25 U.S.C. §1916 8

Miscellaneous: Page

124 *Cong. Rec.* 38102 (1978).....9

Hearings before the Subcommittee on Indian Affairs to the Senate Committee on the Interior and Insular Affairs, "Indian children Welfare Act" 93d Cong. 2d. Sess., (1974).....9

Restatement Second of Conflict of Laws §22 Comment b (1969).....12

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PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

The Petitioner the Fort Peck Assiniboine and Sioux Tribes, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Supreme Court entered October 19, 1995.

OPINION BELOW

The opinion of the Illinois Supreme Court is reprinted in Appendix A.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on October 19, 1995. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTE INVOLVED

The Indian Child Welfare Act of 1978, as codified in 25 U.S.C. §§1901-1963, and more specifically 25 U.S.C. 1911(a).

STATEMENT OF THE CASE

S.S. and R.S. are two minor children who are enrolled members of the Fort Peck Assiniboine and Sioux Tribes (The Tribes). The children's mother, Betty Jo Iron Bear is also a member of the Tribes. On or about November 18, 1992, the non-Indian father of the children, Richard Sansaver, died as a result of an AIDS related illness.(App. A, p.2.)[1] On November 24, 1992, respondents, Leslie Scarlotte Tubridy and Patrick Tubridy, filed a verified petition in the Circuit Court of Kane County Illinois, seeking to adopt S.S. and R.S. (App. B, p.1.)

On December 18, 1992, the Fort Peck Assiniboine and Sioux Tribes filed a Motion to Transfer Jurisdiction. (App. D.) In its Motion, the Fort Peck Tribes sought to take jurisdiction of the [adoption] proceedings and provide planning and placement for the Indian children. (App.D, p.2.) The Tribes based its motion on 25 U.S.C. 1911(a) of the Indian Child Welfare Act of 1978 which grants the Tribes jurisdiction exclusive as to any State over child custody proceedings involving an Indian child who resides or is domiciled within its reservation. In its motion the Tribes expressly stated "In this case the children's' domicile follows the

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[1] References to the Petitioner's Appendix are denoted by a Appendix A,B,C,D,E, or F followed by the page number.

domicile of their parent, Betty Jo Iron Bear, who is domiciled on the Fort Peck Indian Reservation." (App. D, p.2.) Betty Jo Iron Bear by and through counsel, also filed a Motion to Transfer Jurisdiction based on 25 U.S.C. 1911(a) and cited *Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, (1989),* in support of her motion. (App.E.) Betty Jo Iron Bear died on December 22, 1995, and for that reason is not petitioning to review the decision below.

On December 22, 1992, the Circuit Court of Kane County Illinois held a hearing on the jurisdiction questions raised by the Motions to Transfer Jurisdiction. At the hearing the Tribes argued that the verified petition for adoption invoked 25 U.S.C. 1911 (a) and that the children's domicile follows the domicile of the mother. The Tribes supported its argument with an analysis of *Holyfield*. Counsel for the respondent argued that §1911(a) did not apply, that the children were not a part of an existing Indian family and that if the Indian Child Welfare Act did apply the appropriate section would be §1911(b).

The transcript of the proceedings as found in Appendix F shows that the Court did not admit or receive evidence on the merits of the verified petition for adoption. The record is also void of evidence establishing facts by any standard of proof that Betty Jo Iron Bear was an unfit mother.

The Circuit Court for Kane County held that the children are not, and never have been domiciled on any Indian Reservation, that the Indian Child Welfare Act does not apply to these proceedings and denied the Motions to Transfer Jurisdiction. (App. C.)

The Appellate Court of Illinois Second District reversed and remanded the case and ordered the case

transferred to the Fort Peck Tribal Court. (App. B, p.23-24.) At the appellate level Iron Bear and the Tribes argued that 25 U.S.C. 1911(a) applied and that the children were domiciled on the Reservation. (App. B, p.20-24.) Tubridys argued that the Indian Child Welfare Act did not apply because the children had not been removed from an existing Indian family. The appellate court held that Congress imposes no express requirement that the children be part of an Indian family in order for the provisions of the Act to apply.(App. B, p.15.) The Appellate Court found that upon the death of a custodial parent the child's domicile shifts to that of the other parent, (App. B, p. 22.) The Appellate Court held that 25 U.S.C. 1911(a) applied and that the Fort Peck Tribal Court has exclusive jurisdiction over the matter. (App. B, p.24.)

The Supreme Court of Illinois in a 4-to-3 decision reversed and remanded to the Circuit Court for further proceedings with respect to the question of the children's domicile. (App. A, p. 18.) Without any supporting evidence in the record, the majority stated that Richard Sansaver died, "of a disease he contracted from [Betty Jo] Iron Bear." (App. A, p. 1) In dicta the Court also relied upon assertions of Betty Jo Iron Bear's lifestyle which have never been a part of a full judicial proceeding on the merits. (App. A, p. 2.) The dissenting opinion of Justice McMorrow observes there is nothing in the record to verify the claim that Richard Sansaver contracted [his] illness from Betty Jo or to verify the majority's unsubstantiated attacks upon the character and morality of Betty Jo Iron Bear. (App. A, p. 27.)

The Illinois Supreme Court majority acknowledged the rule of law that upon the death of one

parent the domicile of the children shifts to that of the surviving parent. (App. A, p. 14.) But the majority opinion applied the exception under state law that domicile would not shift in the event that the surviving parent abandoned the children. (App. A, pp. 14-18.) The Supreme Court of Illinois reversed and remanded to the Circuit Court for a determination of abandonment. (App. A, p. 18.) Justice McMorrow, joined by two other Justices, dissented. The dissenting Justices would have affirmed the Appellate Court decision. (App. A, p.46.) Justice Heiple joined by two other justices concurred in the judgment. The concurring justices would have held that the ICWA does not apply where there is no existing Indian Family (App. A, pp.18-24.)

REASONS FOR GRANTING THE WRIT

1. The ruling by the Illinois Supreme Court undermines jurisdictional guarantees to the Tribes, granted by Congress under the Indian Child Welfare Act, in conflict with the decision of this Court in *Mississippi Band of Choctaw Indians v. Holyfield*.

In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, (1989), this Court foreclosed the application by state courts of state law doctrines to frustrate the purposes of Congress in enacting the Indian Child Welfare Act, 25 U.S.C. §§1901 et seq. (ICWA). The only possible point of distinction of this case from *Holyfield* is that the court below applied a state law doctrine slightly different from the one employed in *Holyfield*, but with the same outcome--frustration of tribal court jurisdiction that Congress ordained in the ICWA.

In the Indian Child Welfare Act, Congress established a jurisdictional scheme that strongly favors tribal jurisdiction over child custody proceedings involving Indian children. As the Court stated, in *Holyfield*: "[a]t the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings." 490 U.S. *supra* at 36. The Court there stated that "Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child 'who resides or is domiciled within the reservation...'" *Id.* at 36. [2] The Court in

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[2] The exclusive jurisdiction provision of ICWA, 25 U.S.C. 1911(a), reads in full:

Holyfield emphasized the "centrality of the exclusive tribal jurisdiction provision to the overall scheme of the ICWA..." *Id.* at 41.

Even for cases not covered by ICWA's exclusive jurisdiction provision in § 1911(a), the Act contains a preference for tribal court adjudication of Indian child custody matters. In such a case, a state court must, " in the absence of good cause to the contrary... transfer such proceeding to the jurisdiction of the tribe." 25 U.S.C. §1911(b)[3]. And, even in those limited instances where a state court may properly hear an Indian child

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> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

[3] Section 1911 (b) reads in full:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

custody case, ICWA provides strong safeguards to protect tribal interests.[4]

The twofold purpose of the ICWA is to protect the best interest of Indian children and to promote stability and security of Indian tribes and families. The Assiniboine and Sioux Tribes filed this petition to ask this Court to vindicate their tribal interest, specifically protected by Congress in the ICWA, to exercise tribal court jurisdiction to determine the placement of these two tribal members. The Tribes' interest is separate and distinct from that of the Indian parent, family or custodian of the child. As this Court determined in *Holyfield*, the ICWA "was the product of rising concern... over consequences to Indian children, Indian families and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." 490 U.S. *supra* at 32 (emphasis added). As this Court found in *Holyfield*, Congress placed "considerable emphasis on the impact on the tribes

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[4] Even for those cases that are properly in state court, Congress established procedures for those courts to follow on standard of proof, right to counsel, efforts to preserve the family, and other issues. 25 U.S.C. §1912. It established especially strong standards of proof for cases involving termination of parental rights and foster care placement of Indian children. 25 U.S.C. 1912(e),(f). It established placement preferences for both foster care and adoptive placements of Indian children under State law. 25 U.S.C. §1915. And the Act permits Indian children and parents to challenge inappropriate state action in a variety of situations. 25 U.S.C. §§1913(d), 1914, 1916.

themselves of the massive removals of their children," *id.* at 34, (emphasis added)[5] relying in part on a statement by Representative Udall that "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy," *Id.* at n.3, 124 Cong. Rec. 38102 (1978).

The Court in *Holyfield* also relied on specific findings by Congress "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" and "that the States, exercising recognized their jurisdiction... through...judicial bodies, have often failed to recognize the essential tribal relations of Indian people..." *Id.* at 35, quoting 25 U.S.C. §1901(3),(5). See also 490 U.S. at 45. ("Congress perceived the States and their courts as partly responsible for the problem it intended to correct.") In short, as this Court recognized in *Holyfield*, a tribe's "ability to assert its interest in its children... is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." 490 U.S. *supra* at 52, quoting *In re Adoption of Halloway*, 732 P.2d 962, 969-970 (1986).

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[5] Information before Congress when it considered ICWA indicated that between one-quarter and one-third of all Indian children in the United States had been separated from their families by state child placement policies and practices. Hearings before the Subcommittee on Indian Affairs to the Senate Committees on the Interior and Insular Affairs, "Indian Child Welfare Program," 93d Cong., 2d. Sess., p 3 (1974); 124 Cong. Rec. 38102 (1978) (remarks of Rep Udall).

Holyfield also establishes beyond question that upon a finding that an Indian child is domiciled on an Indian reservation, the State is mandated to transfer jurisdiction to the tribe. In this case, as in every judicial proceeding, jurisdiction is the threshold question. Moreover, the question of jurisdiction is particularly critical in Indian Child Welfare Act matters. Congress by granting tribal courts exclusive jurisdiction in cases where the Indian child's domicile is on the reservation protects the best interest of the Indian child and promotes the stability and security of the tribes. The question of domicile and its pendent definition can turn jurisdiction over to the tribal court, the preferred forum intended by Congress in the Indian Child Welfare Act, or can exclude the tribe from determining matters essential to the tribes existence.

In *Holyfield*, this Court rejected arguments that state law should control the definition of "domicile" in §1911(a). In determining the meaning of the term "domicile" as used in the Indian Child Welfare Act, *Holyfield* examined the purpose, language, and legislative history leading to the enactment of the Act. It found:

> [f]irst, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term [domicile]; quite the contrary. It is clear from the very text of the ICWA, ... its purpose was, in part, to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings. Indeed, the congressional findings that are a part of the statute demonstrate that Congress

> perceived the States and their courts as partly responsible for the problem it intended to correct.... Under these circumstances it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law. (emphasis in original).

Holyfield, 490 U.S. *supra* at 44-45.

The *Holyfield* court accordingly determined that a federal common law of domicile should apply to §1911 of the Indian Child Welfare Act. It then looked to generally accepted principles of domicile to establish this federal common law rejecting application of state law standards for domicile that might vary from state to state. 490 U.S. at 43-44. A principal reason advanced by the Court "for the presumption against the application of state law is the danger that 'the federal program would be impaired if state law were to control'" *Id.* at 44.

The Court in *Holyfield* concluded that under the ICWA the domicile of illegitimate children follows that of their mother. Thus, the domicile of the twins in *Holyfield* followed that of their mother on the reservation, even though the children had never been on the reservation and had in fact been abandoned by their mother. *Holyfield*, *Id.* at 53. In so holding, the Court specifically stated that:

> [t]ribal jurisdiction under §1911(a) was not meant to be defeated by the actions of individuals members of the tribe, for Congress

> was concerned not solely about the interests of Indian children and families but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. See 25 U.S.C. §1901(3). *Id.* at 49.

Applying the principles of *Holyfield* to the present case, it is clear that the domicile of the minor children here is that of their mother under §1911(a). As the intermediate appellate court in this case below correctly recognized, even assuming the children's domicile was that of their father, at his death their domicile became that of their sole surviving parent, Betty Jo Iron Bear. [6]

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[6] A review of the generally accepted principles of domicile establishes that at the death of one parent, as in this case, the domicile of the child becomes that of the surviving parent. *Restatement (Second Conflict of Laws* §22 comment b(1969). *See also, People ex. rel. Noonan v. Wingate*, 376 Ill. 244, 33 N.E. 2d. 467, 470 (1941) (at death of the father an infant takes the domicile of its mother); *Clark v. Jelinek*, 414 P. 2d. 892, 893 (Idaho 1966) (domicile of minor follows that of his father after custodial mother's death, even though the father has abandoned the minor child); *In re Skinner's Guardianship*, 230 Iowa 1016, 300 N.W. 2d. 1 (1941); *Peacock v. Bradshaw*, 194 S.W. 2d. 551 (Texas 1946). This rule "prevails even though the decree of divorce awarding custody of the minor child to one parent found that the other parent was an unfit, incompetent and improper person to have custody of the child." 25 Am. Jur. 2d. §, citing *Re Thorne*, 240 N.Y. 444, 148 N.E. 630, *reh. den'd.*, 241 N.Y. 513, 150 N.E. 534 (1925).

In this case, the Illinois Supreme Court held that the children's domicile should not follow that of their mother, because there were allegations of abandonment. The Illinois Supreme Court's decision is contrary to *Holyfield's* holding that a parent's actions can not divest tribal court jurisdiction over a custody proceeding involving an Indian child who is a member of an Indian Tribe. *Holyfield* 490 U.S. at 51-53. Indeed, this Court in *Holyfield* specifically stated:

> "'[State] abandonment law can not be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents.'"

490 U.S. at 53, quoting *Halloway*, 732 P.2d at 97.

The decision below is a transparent circumvention of *Holyfield*. Since at the time of the decision below, the children's only parent was their Indian mother residing on the Fort Peck Reservation in Montana, *Holyfield* plainly establishes that the children must take her domicile irrespective of any alleged abandonment and thus the jurisdiction to determine custody of the children rests exclusively with the Fort Peck tribal court.

2. Review of this case is particularly necessary because the Indian Child Welfare Act is being seriously eroded by State Courts applying exceptions to federal law contrary to this Court's decision in *Holyfield* and to the protections for tribal jurisdiction Congress has enacted.

Review by this Court is particularly necessary here, because the decision below is not an isolated case, standing alone. It is rather one of many state court decisions --both prior to and following *Holyfield* -- which have recurrently refused to implement the basic purpose of the Indian Child Welfare Act to safeguard tribal authority to determine the custody of tribal children. For example, a number of state court cases have held that the ICWA applies only where there is an "existing Indian family" which would be disrupted if the tribal court took jurisdiction and placed the child with an Indian parent or guardian. Eg. *In re Adoption of Infant Boy Crews*, 118 Wash. 2d 561, 825 P. 2d 305, 310-311 (1992); *In re S.C.*, 833 P.2d 1249, 1253-54 (Okla. 1992); *In re Termination of Parental Rights of D.S.* (*In re Adoption of T.R.M.*), 525 N.E. 2d 298 (Ind 1988), cert. denied, 490 U.S. 1069 (1989); *In re Adoption of Baby Boy L.*, 231 Kan. 199, 643 P. 2d 168,175-176 (1982). While the court below rejected that plainly incorrect doctrine[7] by a 4-to-3 vote,[8] it

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[7] This doctrine is contrary to the definition of "Indian child" in the ICWA as " any unmarried person who is under age eighteen and is ... a member of an Indian tribe... and is the biological child of a member of an Indian tribe," 25 U.S.C. §1903(4), and inconsistent with

nonetheless devised another basis to subvert the purpose of the ICWA. These state court holdings ignore the vital and separate tribal interest in preserving its heritage and existence.

Virtually all scholarly commentators have criticized the continuing failure of state courts even after *Holyfield* to defer to tribal court jurisdiction as Congress intended.[9] This Court is familiar with the

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Holyfield It has also been uniformly rejected by scholarly commentators.
Davis, *The Existing Indian Family Exception to The Indian Child Welfare Act*, 69 North Dakota Law Review 465 (1993); Baron, The Resurgence of the "Tribal Interest" in Indian Child Custody Proceedings, 26 Tulsa L.J. 315, 328-332 (1991); Note, The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child? 38 Cath. U.L. Rev. 511, 533-538 (1989).

[8] The doctrine has been rejected by few other state courts, *e.g., In re Adoption of a Child of Indian Heritage*, 111 N.J. 155, 543 A. 2d 925, 931-933 (1988).

[9] E.g., Note, When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in the Indian Child Welfare Act Adoptive Placements, 79 Minn. L. Rev. 1167 (1995); Carriere, Representing the Native American: Culture, Jurisdiction and the Indian Child Welfare Act, 79 Iowa L. Rev. 585, 610-650 (1994); Dale, State Court Jurisdiction under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test, 27 Gonzaga L. Rev. 353, 375-395 (1991-92); Baron, The Resurgence of the "Tribal

reluctance some state courts have shown even in recent years to enforce principles of federal law in other Indian matters. *See e.g.*, *Ramah Navajo School Board v. New Mexico Bureau of Revenue*, 458 U.S. 832, 847(1982) ("[state] courts below apparently gave short shrift to.. [this Court's] precedents in this area..."); *Washington v. Washington State Commercial Fishing Vessel Ass'n*, 443 U.S. 658, 696 n. 36 (1979) (quoting Court of Appeals' observation that "'Except for some desegrations cases... the [federal] district court has faced the most concerted official and private efforts to frustrate a decree of federal court witnessed in this century'"); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676 (1974) ("There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians").

The recurring problem of the highest courts of many states ignoring the purposes of the Indian Child Welfare Act as set by Congress can only be rectified by this Court. Otherwise, the purposes Congress sought to achieve in the Indian Child Welfare Act will continue to be eviscerated by the same state courts that were instrumental in creating the problems that led to the Act.

Congress can hardly re-enact the ICWA adding a provision stating, "We really mean that states courts, must follow this statute." Since ICWA cases all arise in

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Interest" in Indian Child Custody Proceedings, 26 Tulsa L.J. 315; Comment, The Indian Child Welfare Act of 1978: Protecting Essential Tribal Interests, 60 U. Colo. L. Rev. 131,151-163 (1989).

state courts this Court's attention to repeated failures by those courts to enforce the Act is essential.

The Tribes seek here only to vindicate their congressionally-protected right to determine custody of these children in the Tribes' own court. That was a primary purpose of the Indian Child Welfare Act, one that has been ignored by the court below and numerous other state courts. The Tribes have no other recourse to enforce the purposes of the Indian Child Welfare Act unless this Court reviews this case and reverses the judgment below.

CONCLUSION

The Court should grant the petition and reverse the decision below.

Respectfully submitted this 15th day of January 1996.

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APPENDIX A

1995 Opinion No. __

IN THE SUPREME COURT OF
THE STATE OF ILLINOIS

Docket No. 76486

In re ADOPTION of S.S. & R.S.	)	
Leslie Scarlotte Tubridy et al., Appellants,	)	
v.	)	Filed: Oct. 19, 1995
Betty Jo Iron Bear et al., Appellees.	)	

JUSTICE HARRISON delivered the judgment of the court and the following opinion:

This appeal arises from a proceeding involving termination of the parental rights of a Native American Indian mother, Betty Jo Iron Bear, and the adoption of her minor children, S.S. and R.S., by two of their non-Indian relatives, Leslie and Patrick Tubridy. The issue before us is whether the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. §1901

et seq. (1988)) requires the cause to be transferred to the tribal court of the Fort Peck tribe, on whose reservation Iron Bear is domiciled, even though the children's non-Indian father had been granted sole physical custody of them prior to his death and the allegations of the Tubridys' petition, if proven by clear and convincing evidence, would be sufficient to establish that Iron Bear had abandoned the children.

Following a hearing, the circuit court of Kane County denied motions by Iron Bear and the Fort Peck tribe to have the cause transferred to the tribal court. On an interlocutory appeal pursuant to Supreme Court Rule 306(a)(1)(v) (134 Ill. 2d R. 306(a)(1)(v)), a divided appellate court held that the tribal court had exclusive jurisdiction over the mater under section 1911 of the ICWA (25 U.S.C. §1911 (1988)). It therefore reversed and remanded with directions to transfer the cause to that court. (252 Ill. App. 3d 33.) We granted the Tubridys' petition for leave to appeal (145 Ill. 2d R. 315) and now reverse and remand to the circuit court for further proceedings with respect to the question of the children's domicile.

There is no dispute that Iron Bear is a member of the Fort Peck tribe and lives on the Fort Peck reservation in Poplar, Montana. She is the biological mother of S.S. and R.S., who were fathered by Richard S., a non-Indian. Richard S. died on November 18, 1992, of a disease he contracted from Iron Bear. The two were never married.

Although S.S. and R.S. are enrolled members of the tribe, they have been raised predominantly in Illinois by Richard and his family. Iron Bear has never played more than a sporadic role in their lives. In 1990, Richard filed a parentage action in Kane County which resulted in the approval of a joint custody and parenting agreement pursuant to which Richard was awarded physical custody of the children for ten months of the year. Although Iron Bear was awarded physical custody of them for the remaining two months, the children visited the Fort Peck reservation only once after the agreement was reached.

In April 1992, the circuit court of Kane County granted a petition by Richard for the termination of Iron Bear's physical custody rights to the children. Iron Bear claims the order was entered by default because she was unable to appear due to indigence, but the Tubridys say this is not so. They assert that despite her poverty, Iron Bear has consistently had legal representation.

Until shortly before Richard's death, the children resided with him in Elgin. When Richard became too ill to care for the children and himself, the three moved in with one of Richard's sisters, Shelly S., in Carpentersville, where, it appears, the children are still living. Richard was not a Native American and did not associate with any Indian tribe. In addition, neither child has had any significant interaction with an Indian tribe beyond their one visit to the reservation.

Six days after Richard's death, the Tubridys filed a petition to terminate Iron Bear's parental rights and to adopt the children, as Richard had requested in his will. Leslie Tubridy is another of Richard's sisters, and she and Patrick are the paternal aunt and uncle of S.S. and R.S. The basis they asserted for termination of parental rights was that Iron Bear was an unfit parent. The Tubridys charged that Iron Bear had abandoned the children during the two years prior to the adoption proceedings. Before that time, the Tubridys alleged, she engaged in open and notorious fornication, habitually abused alcohol, and failed to provide the children with adequate food, clothing and shelter even though she was physically and financially able to do so.

Iron Bear responded by filing a petition for an emergency order of protection. In that petition she asserted that she had traveled to Illinois upon learning of Richard's death, but that Shelly S. had refused to allow her to see the children or to disclose their whereabouts. She further claims, upon information and belief, that the Tubridys had fled with the children to the Tubridy home in Ohio. As a result, the court entered an order requiring immediate return of the children to Illinois, and there is no dispute that they are now back in this State.

At the same time she sought the protective order, Iron Bear moved to transfer jurisdiction of the adoption proceeding to the Fort Peck tribal court in Poplar, Montana, and to dismiss the State-court proceeding. Shortly thereafter, the tribe filed a substantially identical motion. The motions invoked

section 1911(a) of the ICWA, which states that the tribe has "jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." (25 U.S.C. §1911(a) (1988).) Iron Bear and the tribe argued that S.S. and R.S. are "Indian children," as that term is defined in section 1903(4) of the Act (25 U.S.C. §1903(4) (1988)) and that, like Iron Bear, both children are enrolled members of the Fort Peck tribe, a federally recognized "Indian tribe," as defined by section 1903(8) of the ICWA (25 U.S.C. §1903(8) (1988)). Iron Bear alleged that because she is the sole parent of S.S. and R.S. and because she is domiciled on the Fort Peck reservation, the domicile of the children is also on the reservation (*Mississippi Band of Choctaw Indians v. Holyfield* (1989), 490 U.S. 30, 104 L. Ed. 2d 29, 109 S. Ct. 1597), and that the tribe therefore has exclusive jurisdiction over the matter of the children's adoption.

In their response, the Tubridys contended that the ICWA is inapplicable. They argued that the purpose of the Act is to prevent the breakup of Indian families, and that S.S. and R.S. are not domiciliaries of an Indian reservation or part of an Indian family. They alleged that R.S. was born in Elgin, Illinois, and that both R.S. and S.S. had lived substantially all of their lives there with their non-Indian father, who did not associate with or encourage the children's association with an Indian tribe. The Tubridys claimed that the children's part-Indian ancestry has no

relation to their average suburban upbringing because neither child had ever resided on or near an Indian reservation for any significant period of time or had any significant contact or interaction with an Indian tribe. According to the Tubridys, jurisdiction belongs in the State court because Richard had sought and obtained sole physical custody of the children and had stated prior to his death that he did not want Iron Bear or her relatives to obtain custody of the children, which actions constituted a "parental objection" under section 1911(b) of the ICWA to the transfer of jurisdiction to the tribal court. The Tubridys also argued that the ICWA permits State courts to retain jurisdiction if there is "good cause," and that the facts of this case establish that the best interests of the children constitute such "good cause."

After arguments on the issue of jurisdiction, the circuit court denied the motions to transfer, finding that the children are not and have never been domiciled on the reservation and that the ICWA was inapplicable. The appellate court, with one justice dissenting, held that the provisions of the ICWA did apply here and that the children were domiciliaries of the reservation. The court therefore reversed and remanded the cause to the trial court with directions to transfer jurisdiction to the Fort Peck tribal court.

We begin our review of the case with the provisions of the ICWA. That legislation was enacted by Congress in 1978 in response to extensive evidence indicating that large numbers of Indian children were being separated from their families and their tribes and were being placed in non-Indian homes through

State foster care placement and adoption proceedings. (*Holyfield*, 490 U.S. at 32, 104 L. Ed. 2d at 36, 109 S. Ct. at 1600.) This practice caused serious harm to the Indian children, their parents and their tribes.

Evidence at congressional hearings included testimony concerning problems experienced by the children during adolescence, such as difficulty coping in a white society even where they had been raised in a purely white environment. There was also considerable emphasis during the hearings on how placements of Indian children into non-Indian families adversely affected the tribes' ability to function as self-governing communities. Sponsors of the ICWA noted that Indian tribes and Indian people were being drained of their children and, as a result, the future of the tribes and Indian people was being placed in jeopardy. *Holyfield*, 490 U.S. at 33-34 & n.3, 104 L. Ed. 2d at 36-37 & n.3, 109 S. Ct. at 1600-01 & n.3.

In enacting the ICWA, Congress incorporated the following statement of findings:

> "Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds
>
> (1) that *** [through the authority of the United States Constitution], Congress has plenary power over Indian affairs:
>
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed

> the responsibility for the protection and preservation of Indian tribes and their resources:
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe:
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes, and institutions; and:
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (25 U.S.C. §1901 (1988).)

Congress declared it to be the policy of the United States:

> "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture ***." 25 U.S.C. §1902 (1988).

At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. (*Holyfield*, 490 U.S. at 36, 104 L. Ed. 2d at 38, 109 S. Ct. at 1601.) A "child custody proceeding" as defined by the ICWA refers to any proceeding involving foster care placement, termination of parental rights, preadoptive placement or adoptive placement. (25 U.S.C. §1903(1)(1988).) The only two exceptions from that definition are awards of custody to one of the parents in divorce proceedings and delinquency proceeding placement. (25 U.S.C. §1903(1)(1988).) The ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. §1903(4)(1988).) The definition of an "Indian child's tribe" relevant to this appeal is "the Indian tribe in which an Indian child is a member or eligible for membership." 25 U.S.C. §1903(5)(1988).

Under section 1911(a) the tribal court possesses exclusive jurisdiction "over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe." (25 U.S.C. §1911(a) (1988).) In the case of Indian children not domiciled or residing within the reservation of the child's tribe, section 1911 (b) creates concurrent but presumptively tribal jurisdiction, and requires State courts to transfer jurisdiction over the proceedings to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court. 25 U.S.C. §1911(b)(1988).

It is undisputed that the proceeding before us is a "child custody proceeding" and that S.S. and R.S. qualify as "Indian children" within the meaning of the ICWA. For the purposes of determining who should have jurisdiction of the proceeding under the Act, the initial question we must resolve is the location of their domicile. In reversing the circuit court, the appellate ruled, based on *Holyfield*, that the children's domicile was the same as that of their mother, Iron Bear, *i.e.*, the Fort Peck reservation. In our view, however, *Holyfield* does not compel that result.

In *Holyfield*, the United States Supreme Court considered the issue of the domicile of twin infants born to unmarried Indian parents. The parents, enrolled members of the Choctaw tribe and domiciliaries and residents of the Choctaw reservation in Nashoba County, Mississippi, traveled 200 miles off the reservation, to Harrison County, Mississippi, for the twins' birth, and immediately thereafter executed

consent-to-adoption forms. Two months after a final decree of adoption was entered by the State court, the tribe moved to vacate the decree on the ground that the ICWA vested it with exclusive jurisdiction over the adoption proceeding because the parents were members of the tribe and domiciliaries of the reservation. Recognizing that the jurisdictional question turned on whether the children were domiciled on the reservation, the Supreme Court of Mississippi determined that they were not and, thus, affirmed the decree of the lower court.

Before reaching the specific issue of domicile, the United States Supreme Court in *Holyfield* examined the previously discussed legislative history and underlying policies of the ICWA. Noting, then, that "domicile" is not defined in the ICWA, the United States Supreme Court stated that the meaning of "domicile" is a matter of Congress' intent. (*Holyfield*, 490 U.S. at 43, 104 L. Ed. 2d at 43, 109 S. Ct. at 1605.) The Court rejected the notion that Congress intended the definition of "domicile" to be a matter of State law. First, the Court determined that the purpose of the ICWA gave no reason to believe that Congress intended to rely on State law for the definition of a critical statutory term. To the contrary, the Court found from the text of the ICWA and its legislative history and hearings that the purpose of the ICWA was, in part, to make clear that in certain situations the State courts did *not* have jurisdiction over child custody proceeding (*Holyfield*, 490 U.S. at 43-45, 104 L. Ed. 2d at 43-44, 109 S. Ct. at 1606-07), and that the main effect of the ICWA was to curtail the authority

of individual States (*Holyfield*, 490 U.S. at 45 n.17, 104 L. Ed. 2d at 44 n.17, 109 S. Ct. at 1606 n.17). The Court observed:

> "Indeed, the congressional findings that are part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct. [Citation.] Under these circumstances, it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law." (*Holyfield*, 490 U.S. at 45, 104 L. Ed. 2d at 44, 109 S. Ct. at 1606-07.)

In further support of its position, the *Holyfield* Court also noted that resort to State-law definitions of domicile would result in the lack of nationwide uniformity and could even produce a situation where the ICWA would be applied differently to the same child simply as a result of where the child was located or transported. Reasoning that Congress could hardly have intended such a result, the Court concluded that Congress must have intended a uniform Federal law of domicile for the ICWA. *Holyfield*, 490 U.S. at 45-47, 104 L. Ed. 2d at 44-45, 109 S. Ct. at 1607.

The Court then looked to the generally accepted meaning of the term "domicile," borrowing from "established common-law principles of domicile to the extent that they are not inconsistent with the objectives of the congressional scheme." (*Holyfield*,

490 U.S. at 47-48, 104 L. Ed. 2d at 46, 109 S. Ct. at 1608.) Citing the Restatement (Second) of Conflict of Laws, sections 11 through 23 (1971), and other commentaries and decisional law, the Court noted that it was generally uncontroverted that "domicile" is not necessarily synonymous with "residence" and that one can reside in one place but be domiciled in another. In the case of adults, domicile is established by physical presence in a place in connection with an intention to remain there. Because most minors are legally incapable of forming the requisite intent to establish a domicile, however, their domicile is usually determined by that of their parents. Traditionally, in the case of children born out of wedlock, the child takes the domicile of the mother. (*Holyfield*, 490 U.S. at 48, 104 L. Ed. 2d at 46, 109 S. Ct. at 1608.) Observing that the domicile of the twins' mother, as well as the father, had at all times been on the reservation, the Court found it indisputable that the domicile of the twins was also on the reservation even though they had never been there. *Holyfield*, 490 U.S. at 48-49, 104 L. Ed. 2d at 46-47, 109 S. Ct. at 1608. See also *In re Adoption of a Baby Child* (N.M. App. 1985), 700 P.2d 198, 200-01 (child's domicile was that of the mother on the reservation).

The situation in this case is distinguishable. Although Iron Bear was domiciled on the reservation, the children's father was not, had never been, and did not want to be. His domicile was in Illinois. Because he had sole custody of the children, that was their domicile as well.

Upon the father's death, the domicile of the children would normally have reverted to that of their mother. *People ex rel. Noonan v. Wingate* (1941), 376 Ill. 244, 249 (at common law upon the death of the father an infant took the domicile of its mother); 25 Am. Jur. 2d *Domicil* §67 (1966) (upon the death of the parent to whom custody of a child has been awarded the domicile of the child becomes that of the surviving parent); Restatement (Second) of Conflict of Laws §22, Comment *b*, at 63 (1971)(upon the death of the parent who has been awarded legal custody of the child or with whom the child has been living, the child's domicile shifts to that of the other parent even though the latter is domiciled in another State).

An exception to this general rule has been recognized, however, where the surviving parent has abandoned the child. (Restatement (Second) of Conflict of Laws §22, Comments *e, i* (1971).) If a child is left parentless as a result of death and/or abandonment, and no legal guardian of the child's person has been appointed, the child takes the domicile of the person who stands *in loco parentis* to him and with whom he lives. Restatement (Second) of Conflict of Laws §22, Comment *i* (1971); see *Donlon v. Miller* (1976), 42 Ill. App. 3d 64, 71.

An important limitation on this rule is that the doctrine of abandonment cannot be used by Native American Indian parents as part of a scheme to facilitate adoption of their children by non-Indians while they remain domiciliaries of the reservation. Otherwise, the purpose of the ICWA would be undermined, and the tribe's ability to assert its interest

in its children would be weakened. (*Holyfield*, 490 U.S. at 52, 104 L. Ed. 2d at 49, 109 S. Ct. at 1610; *In re Adoption of Halloway* (Utah 1986), 732 P. 2d 962, 969.) In this case, however, there plainly was no such scheme, and application of common law abandonment doctrine can do no possible violence to the purposes of the Act. Accordingly, if Iron Bear were found to have abandoned her children, the children's domicile would remain in Illinois even after their father's death.

For the purposes of establishing domicile, abandonment occurs when the parent deserts the child or when the parent gives custody of the child to another with the intention of relinquishing his parental rights and obligations. To determine whether an abandonment has taken place, the rules of the forum are normally applied. (Restatement (Second) of Conflict of Laws §22, Comment *e* (1971).) If substantiated at a hearing in a trial court, the allegations made by the Tubridys would be sufficient under Illinois law to find abandonment. Because of the procedural posture of this case, however, there has never been a hearing to determine whether Iron Bear has abandoned her children. Given the importance of the abandonment issue to resolution of where the children are domiciled, the judgments of the circuit and appellate courts must be therefore be reversed, and the cause must be remanded to the circuit court for a finding as to whether Iron Bear abandoned R.S. and S.S. If the hearing discloses that there has not been abandonment, then the children would have to be deemed domiciliaries of the reservation, the tribe would have exclusive jurisdiction under section 1911(a)

of the ICWA (25 U.S.C. §1911(a)(1988)), and the circuit court of Kane County would be required to transfer the cause to the Fort Peck tribal court.

On the other hand, if Iron Bear were proven to have abandoned her children, then the tribe would not have exclusive jurisdiction under section 1911(a) because the children would then neither reside nor be domiciled on the reservation. Instead, the operative provision would be section 1911(b) of the ICWA (25 U.S.C. §1911(b) (1988)), which confers concurrent jurisdiction of the State courts along with the tribal court where the child is not domiciled and does not reside on the reservation. Under section 1911(b), there is still a presumption that the tribal court should hear the case, but transfer to the tribal court is not required where there is objection by either parent or where the trial court finds good cause to deny such a transfer.

In order to assist State courts in determining what constitutes good cause to deny a request to transfer a custody dispute to a tribal court under section 1911(b), the Bureau of Indian Affairs has promulgated nonbinding guidelines. (*Guidelines for State Courts: Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584 (1979) (hereinafter, *Guidelines*).) Among the several possible "good cause" reasons for refusing to transfer an Indian child custody case to the tribal court is that the evidence could not be presented in tribal court without undue hardship to the parties or witnesses. (*Guidelines*, 44 Fed. Reg. at 67,591.) Although the guidelines are not binding, the courts have recognized that section 1911(b) of the ICWA (25

U.S.C. §1911(b) (1988)) authorizes use of a modified version of *forum non conveniens* when deciding whether to retain or transfer jurisdiction in Indian child custody proceedings. See *In re C.W.* (1992), 239 Neb. 817, 825-26, 479 N.W.2d 105, 113; *In re Maricopa County Juvenile Action No. JS-8287* (1991), 171 Ariz. App. 104, 107, 110, 828 P.2d 1245, 1248, 1251; *Chester County Department of Social Services v. Coleman* (1990), 303 S.C. 226, 229-32, 399 S.E.2d 773, 775-76.

We can take judicial notice of the fact that Poplar, Montana, where the Fort Peck tribal court is located, is more than 1,100 miles from Chicago metropolitan area where S.S. and R.S. reside. Traveling this distance for the termination/adoption hearing would be unduly burdensome on the children, their custodians, the adoption petitioners, and all the other potential witnesses involved with the children's lives, all of whom, apart from Iron Bear, reside in Illinois. Because the bulk of the evidence and the majority of the witnesses necessary to the termination of parental rights action are located in Illinois, a transfer would assuredly constitute an undue hardship. Accordingly, under section 1911(b) of the ICWA, good cause would exist to allow the circuit court of Kane County to retain jurisdiction over the Tubridys' custody petition. See *In re Maricopa County Juvenile Action*, 171 Ariz. App. 104, 828 P.2d 1245 (good cause existed to deny transfer from Arizona to out-of-state tribal court); *In re J.R.H.* (Iowa 1984), 358 N.W.2d 311 (because of geographical obstacles, transfer from Iowa to tribal court in South Dakota would cause undue hardship to parties and witnesses and constituted good

cause not to transfer). *Chester County Department of Social Services*, 303 S.C. 226, 399 S.E.2d 773 (where most of the witnesses and evidence were in South Carolina, good cause existed to deny transfer to tribal court in South Dakota).

For the foregoing reasons, the judgment of the appellate court is reversed, and the cause is remanded to the circuit court for a hearing on whether Iron Bear abandoned R.S. and S.S. If the court finds that there was no abandonment, it shall enter an order transferring this cause to the Fort Peck tribal court. If it determines by clear and convincing evidence that abandonment did occur, it shall reinstate its prior orders denying transfer to the tribal court and retain jurisdiction over the Tubridys' cause of action.

Reversed and remanded with directions.

JUSTICE HEIPLE, concurring in the judgment:

Insofar as neither Justice Harrison nor the dissenters in this case will apply the existing Indian family exception to the Indian Child Welfare Act (ICWA), I concur in the judgment of this court as set forth by Justice Harrison: to wit, that the appellate court should be reversed and this matter remanded to the circuit court for an abandonment hearing to determine where the children are domiciled and thus whether the Illinois courts can retain jurisdiction over this custody dispute pursuant to the ICWA. I write separately, however, to express my view that this court should recognize that the ICWA does not apply where there is no existing Indian family.

Where, as with S.S. and R.S., there is no existing Indian family and the children have never been part of an Indian cultural setting or lived on a reservation, there is no justification for applying the ICWA. It is this rationale that constitutes the existing Indian family exception and Illinois should join the majority of jurisdictions that have adopted the exception and refused to apply the ICWA where children are not part of an existing Indian family. (See *In re Adoption of Baby Boy L.* (1982), 231 Kan. 199, 643 P.2d 168; *S.A. v. E.J.P.* (Ala. Civ. App. 1990), 571 So. 2d 1187; *In re Termination of Parental Rights of D.S.* (Ind. 1991), 577 N.E.2d 572; *In re Adoption of Infant Boy Crews* (1992), 118 Wash. 2d 561, 825 P.2d 305; *In re S.C.* (Okla. 1992), 833 P.2d 1249; *In re T.S.* (1990), 245 Mont. 242, 801 P.2d 77; *In re C.E.H.* (Mo. App. 1992), 837 S.W.2d 947; *In re C.W.* (1992), 239 Neb. 817, 479 N.W.2d 105.) Applying the exception in Illinois would limit the ICWA's scope to the issue Congress sought to remedy: namely, the attempts of third parties to remove Indian children from existing Indian families or reservations. 25 U.S.C. §1902 (1988).

The underlying history and purpose of the ICWA evidence that Congress intended the Act to apply only where third parties seek to remove Indian children from their existing Indian families or cultural settings. Congress enacted the ICWA in recognition of the invasive nature of some State agencies vis-a-vis the custody of Indian children on Indian reservations. The intent underlying the ICWA is apparent in the Act's statement of purpose, which reads as follows:

> "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards *for the removal of Indian children from their families* and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture ***." (Emphasis added.) (25 U.S.C. §1902 (1988).)

Indeed, the underlying thread that runs throughout the Act is the prevention of the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family. (See 25 U.S.C. §§1901(4), (5) (1988); see also *In re Adoption of Baby Boy L.* (1982), 231 Kan. 199, 206, 643 P.2d 168, 168.) Stated otherwise, the ICWA attempts to ensure that, "where possible, an Indian child should *remain* in the Indian community." H.R. Rep. 95-1386, 95th Cong. 2d Sess. 23 (1978).

In refusing to apply the existing Indian family exception, the dissent argues that the Supreme Court's decision in *Holyfield* precludes adoption of the exception. (*Mississippi Band of Choctaw Indians v. Holyfield* (1989), 490 U.S. 30, 104 L. Ed. 2d 29, 109 S. Ct. 1597.) The *Holyfield* Court, however, never refers to the existing Indian family exception. The sole issue before the Court concerned the domicile of the twin children at issue. Indeed, the Supreme Court has never granted *certiorari* in any of the numerous cases where our sister state courts have employed the exception, including several cases decided after the Supreme Court's 1988 decision in *Holyfield*. See *In re*

Termination of Parental Rights of D.S. (Ind. 1991), 577 N.E.2d 572; *In re Adoption of Infant Boy Crews* (1992), 118 Wash. 2d 561, 825 P.2d 305; *In re S.C.* (Okla. 1992), 833 P.2d 1249; *In re T.S.* (1990), 245 Mont. 242, 801 P.2d 77; *In re C.E.H.* (Mo. App. 1992), 837 S.W.2d 947; *In re C.W.* (1992), 239 Neb. 817, 479 N.W.2d 105.

Moreover, the facts of *Holyfield* are wholly inapposite to those of the instant case. *Holyfield* concerned unmarried American Indian parents, both of whom resided and were domiciled on the reservation. (*Holyfield*, 490 U.S. at 37-39, 104 L. Ed. 2d at 39-40, 109 S. Ct. at 1602-03.) Immediately prior to their twins births, the parents drove off the reservation to a hospital 200 miles away and, upon the children's delivery, placed them with an adoptive family. They then drove back to their reservation. Two months later, the tribe sought to have the adoption invalidated because the tribe had not received the requisite notice under the ICWA and the State court had not, as is mandated by the ICWA, made any effort to place the children with members of their extended family or with another American Indian family. The trial court ruled against the tribe and the Mississippi Supreme Court affirmed, ruling that the children had never been domiciled on the reservation and thus that Mississippi properly exercised jurisdiction over the adoption.

The Supreme Court in *Holyfield* reversed the Mississippi Supreme Court, holding that the ICWA could not be defeated by "individual reservation-domiciled tribal members" intentionally leaving the reservation in order that their children could be

placed in an adoptive home off the reservation. (*Holyfield*, 490 U.S. at 53, 104 L.Ed. 2d at 49, 109 S. Ct. at 1610.) Rather, the Court held that the tribe had exclusive jurisdiction under the Act because the domicile of minors follows that of their parents and the parents at issue clearly never intended to be domiciled anywhere other than on the reservation.

In refusing to recognize the existing Indian family exception, the dissent contends that the reasoning of *Holyfield* suggests that the exception violates the ICWA. Specifically, the dissent opines that *Holyfield* stands for the proposition that the ICWA grants the tribes an interest in children separate from that of the children's parents and thus that the existing Indian family exception is improper because it ignores the tribe's interest. This, however, overstates the case.

Under the ICWA, the tribe has exclusive jurisdiction over custody disputes involving Indian children residing or domiciled on the reservation, and where neither of the parent's object. (25 U.S.C. §1911(a) (1988).) Moreover, the ICWA requires that an effort be made to place these children with a member of their extended family or with another American Indian family. (25 U.S.C. §1915(1988).) This, however, is the extent of the tribe's interest. The interest of the tribe is thus not ignored under the existing Indian family exception because, as in the instant case, the exception would only be applied where the children are not part of an existing Indian family. (For post-*Holyfield* cases employing the exception, see *In re Termination of Parental Rights of*

D.S. (Ind. 1991), 577 N.E.2d 572; *In re Adoption of Infant Boy Crews* (1992), 118 Wash. 2d 561, 825 P.2d 305; *In re S.C.* (Okla. 1992), 833 P.2d 1249; *In re T.S.* (1990), 245 Mont. 242, 801 P.2d 77; *In re C.E.H.* (Mo. App. 1992), 837 S.W.2d 947.) Indeed, it is significant that S.S. and R.S. have never resided on the reservation with their mother, except for one summer visit. Rather, they have been raised and domiciled in Illinois for virtually their whole lives.

The dissent's contention that the exception contravenes the intent of Congress in passing the ICWA also ignores Congress' refusal to abolish the existing Indian family exception. A 1987 amendment to the ICWA presented to the Senate by the Committee for Indian Affairs would have made application of the ICWA mandatory regardless of whether the child had "previously lived in Indian Country, in an Indian cultural environment or with an Indian parent." (See S. 1976, 100 Cong., 1st Rec. S18532, S18533 (daily ed. Dec. 19, 1987).) The amendment never made it to the floor of the Senate and has not been presented since. Congress is well aware of the existing Indian family exception and apparently has chosen not to change the statutory language of the ICWA to preclude application of the exception.

I note finally the dissent's intimation that in favoring an abandonment hearing or the adoption of the existing Indian family exception prejudice against or distrust of the Fort Peck tribal court is evidenced. This is not the case and beside the point. S.S. and R.S., at least one-half Caucasian, have lived their

whole lives in Illinois divorced from their Indian heritage as a result of their mother's lack of involvement and arguable abandonment. Illinois has a complex set of statutes designed to ensure the best interests of its citizens, including children in situations such as S.S. and R.S. This court is familiar with and regularly called upon to interpret these statutes which are rooted in the common law and have withstood the test of time. My desire to apply Illinois law if possible stems from my confidence in these laws, all of which aim to achieve what is in the best interest of S.S. and R.S.

CONCLUSION

I would hold that the ICWA does not apply in the instant case because S.S. and R.S. are not part of an existing Indian family. Jurisdiction over the custody dispute would thus remain with the Illinois courts and there would be no need for an abandonment hearing to determine where the children are domiciled. Nevertheless, insofar as a majority of this court refuses to acknowledge the existing Indian family exception, I concur in the judgment set forth by Justice Harrison that the appellate court should be reversed and this matter remanded to the circuit court to determine where the children are domiciled and thus whether the Illinois courts can retain jurisdiction over this custody hearing pursuant to the ICWA.

CHIEF JUSTICE BILANDIC and JUSTICE MILLER join in this concurrence.

JUSTICE McMORROW, dissenting:

> "[Lack of knowledge] is one of the greatest barriers to understanding between different peoples. If we do not understand each other, if we do not know the culture and history of each other, it is difficult to see the value and dignity of each other's societies. This is especially true in relations between Indians and non-Indians." Chief Justice Robert Yazzie, Navajo Nation Supreme Court, *as quoted in* Comment, *Tribal Jurisdiction Under Section* 1911(b) *of the Indian Child Welfare Act of [1978]: Are the States Respecting Indian Sovereignty?* 23 N.M. L. Rev. 479, 496 (1993).

In the late 1970s, Congress recognized that profound ignorance and misunderstanding of Native American Indian cultural values were prompting State social welfare agencies to engage in the wholesale removal of Indian children from their families and the placement of those children in non-Indian homes. Such removals worked a great hardship on the Native American Indian children, their families, and their tribes. Congress enacted the indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. §1901 *et seq.* (1988)), in an effort to prevent the placement of Indian children into non-Indian families, by restoring and preserving Native American Indian tribal court jurisdiction over custody proceedings involving Indian children.

In the present appeal, the majority misapprehends the central focus of the ICWA and

ignores Congress' plenary powers to give superior authority to a tribal court to assert jurisdiction over custody cases involving Native American Indian children. The unfortunate effect of the majority's opinion is to revert to and perpetuate the regressive State policies and practices that led Congress to enact the ICWA.

The majority opinion misstates the issues presented in this appeal. This court was asked to decide whether it should adopt the "existing Indian family doctrine," which limits application of the ICWA to Indian children who are members of an "existing Indian family." The second issue involves the domicile of two Indian children upon the death of one parent. The majority acknowledges that under the ICWA and traditional principles of common law, the children in the instant cause would take the domicile of their mother, who is their surviving parent. Nevertheless, without the benefit of briefing and argument, the majority *sua sponte* raises the question of whether the ICWA can be superseded by State domicile law when a nonparent seeking custody alleges that the surviving parent has "abandoned" the children.

Because I believe that these questions should be answered in the negative, I respectfully dissent. The majority is remiss for its failure to address, consider, or resolve the primary issue raised by the parties and ruled upon by the appellate court, *i.e.*, the validity and scope of the existing Indian family doctrine. In addition, the majority's remand of the cause for an "abandonment" hearing in order to determine the children's domicile strongly suggests that the circuit

court should retain jurisdiction over the parties' adoption dispute, in contradiction to the plain terms of the ICWA.

Background

The parties in this case are the petitioners, Leslie Scarlotte Tubridy and her husband, Patrick Tubridy (Tubridys), respondent Betty Jo Iron Bear (Betty Jo), respondents Fort Peck Assiniboine and Sioux tribes (Fort Peck tribe or tribe) and Betty Jo's two children, S.S. and R.S.

Although parts of the majority's recitation of the facts are accurate, the majority improperly supplements the record with matters that are unproven. In so doing, the majority attempts to justify its decision by indulging in unsubstantiated attacks upon the character and morality of Betty Jo, the children's surviving Indian parent. For example, the record does not disclose the cause of Richard's death. Nevertheless, the majority states that he died "of a disease he contracted from" Betty Jo (slip op. at at 1). The briefs to this cause contain arguments from the parties alleging that Richard suffered from acquired immune deficiency syndrome (AIDS), an illness from which Betty Jo also apparently suffers. However, there is nothing in the record to verify the claim that Richard died from AIDS, or that he contracted the illness from Betty Jo. There is no justifiable reason for the majority to make any reference to the nature or cause of Richard's death. Moreover, the majority fails to explain the relevance of this alleged information with respect to the true issue in this cause, which is the tribe's jurisdiction under the ICWA.

The majority is without support in its statement that the children have "visited the Fort Peck reservation only once" and that "neither child has had any significant interaction with an Indian tribe beyond their one visit to the reservation." (Slip op. at 2.) The record does not establish how many times the children have visited the Fort Peck reservation. It is also significant, but undisclosed by the majority, that Betty Jo allegedly has had continuing contact with the children, thereby maintaining the children's contact with their tribal heritage. Her claim that she has had repeated phone conversations with the children, and corresponded with them, stands unrefuted by the Tubridys.

The majority's ruling also reflects a more fundamental error: a failure to appreciate that the ICWA is founded on recognizing and preserving the distinctive character of Indian cultural heritage, such as that of Betty Jo and the Fort Peck tribe. Unfortunately, the majority has devised a strategy, albeit legally unsupportable, to circumvent the requirements of the ICWA.

Indian Child Welfare Act of 1978

Congress enacted the Indian Child Welfare Act in 1978 in response to extensive evidence indicating that large numbers of Indian children were being removed from their Indian families and their tribes and were being placed in non-Indian homes through State foster care placement, termination of parental rights and adoption proceedings. (*Mississippi* **Band** *of Choctaw Indians v. Holyfield* (1989), 490 U.S. 30, 32,

104 L. Ed. 2d 29, 36, 109 S. Ct. 1597, 1600.) It was revealed that such displacements were prompted by a profound misunderstanding of Indian child-rearing methods as well as a more generalized indifference or antipathy to Indian cultural values and beliefs. For example, State social workers often believed that Indian parents had abandoned their children, when in reality the parents were merely following the Indian custom of collective child-rearing by several members of the child's extended family. The State social workers' failure to acknowledge and appreciate this Indian customer played a role in many instances where children were separated from their Indian families. Only a small percentage of Indian children were placed in foster or adoptive care because of parental abuse; the great majority were removed from their Indian families based on allegations of parental neglect and abandonment. H.R. Rep. 95-1386. 95th Cong., 2d Sess. 10 (1978) (hereinafter House Report).

In fact, information submitted at the congressional hearings "disclosed what almost amount[ed] to a callous raid on Indian children" and indicated that the children were "removed from their parents and families by State agencies for the most specious of reasons in proceedings foreign to the Indian parents." (124 Cong. Rec. 12532 (1978) (remarks of Rep. Udall).) It was also revealed that Indian children were placed for adoption and foster care at an alarmingly higher rate than were non-Indian children. (S. Rep. No. 95-597, 95th Cong., 1st Sess. 11 (1977) (hereinafter Senate Report): House Report at 9.) According to a sponsor of the ICWA,

> "Studies *** revealed that about 25 percent of all Indian children [were] removed from their homes and placed in some foster care or adoptive home or institution. *** The most distressing and critical factor giving rise to this emerging crisis of Indian families [was] *** the inability or unwillingness of State agencies or officials to understand the different cultural and social norms prevailing in the Indian world. The record shows that, in all too many cases, Indian parents ha[d] their children forcibly taken from them not because they [were] unfit parents or because they [could not] adequately provide for their children as measured by the norms prevailing in the Indian community, but because they are Indians." 124 Cong. Rec. 38102 (October 14, 1978) (remarks of Rep. Udall).

See also Myers, Gardner & Geary, *Adoption of Native American Children and the Indian Child Welfare Act,* 18 S. Ct. J. 17 (1994).

It was perceived that part of the reason for such widespread removal of Indian children from their families was to accomplish a "forced acculturation of Native American children into Euro-American society"; the ICWA was adopted in order to end such practices "by recognizing a predominantly tribal jurisdiction over tribal child welfare cases." (Carriere, *Representing the Native American: Culture,*

Jurisdiction, and the Indian Child Welfare Act, 79 Iowa L. Rev. 585, 589 (1994) (hereinafter *Representing the Native American*).) It was further recognized that the widespread practice of placing Indian children in non-Indian families caused serious harm to the Indian children, their parents and their tribes. As explained by Chief Calvin Isaac, a representative of the National Tribal Chairmen's Association who testified before Congress, " '[c]ulturally, the chances of Indian survival [and the transmission of tribal heritage] are significantly reduced [when Indian children are raised] *** in non-Indian homes and denied exposure to the ways of their People.' "He further testified that the practice of removing Indian children from the custody of their natural parents by nontribal authorities " 'seriously undercut[s] the tribes' ability to continue as self-governing communities.' " He opined that " '[p]robably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.' " *Holyfield,* 490 U.S. at 34, 104 L. Ed. 2d at 37, 109 S. Ct. at 1600-01 (quoting from the transcripts of the hearings before the Senate Select Committee on Indian Affairs, 95th Cong., 2nd Sess. 193 (1978)).

Although the majority acknowledges that the ICWA was adopted to remedy these problems, the majority ignores that these very issues are present in the instant cause. The majority refuses to confront and grapple with the reality that there can be significant and possibly irreparable harm that is inflicted on Indian children, Indian families, and Indian tribes when Indian tribes are wrongfully

deprived of their rightful jurisdiction to determine custody disputes involving Indian children.

The majority also acknowledges, but fails to give content to, the statement of findings and policy adopted by Congress when it enacted the ICWA. Congress emphasized at length that the ICWA was consistent with the special duty that the United States has to preserve and protect Indian tribes. (See 25 U.S.C. §1901 (1988).) In enacting the statute, Congress reiterated that it was intended to greatly reduce State involvement in Indian child custody disputes, inasmuch as Congress had determined that "the States, exercising their recognized jurisdiction over Indian child custody proceedings *** have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (25 U.S.C. §1901(5) (1988).) In order to prevent or reduce State involvement, Congress declared that it was the policy of the ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families *by the establishment of minimum Federal standards* for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." (Emphasis added.) 25 U.S.C. §1902 (1988).

The majority's decision eviscerates the ICWA's requirement for consistent and uniform minimum Federal standards and replaces it with the peculiar vagaries of Illinois law with respect to whether alleged parental "abandonment" causes a change in a child's

domicile. Such was not the spirit or intent of Congress when it enacted the ICWA, and the majority's disposition is a plain violation of the express terms of the Federal statute.

Under section 1911(a) of the ICWA, the tribal court possesses exclusive jurisdiction "over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe." (25 U.S.C. §1911(a) (1988).) In the case of Indian children not domiciled or residing within the reservation of the child's tribe, section 1911(b) creates concurrent but presumptively tribal jurisdiction and requires State courts to transfer jurisdiction over the proceedings to the tribal court, except in cases of "good cause." 25 U.S.C. §1911(b) (1988).

Whether a child is "domiciled" on a reservation for purposes of a court's jurisdiction under the ICWA was considered at length by the United States Supreme Court in *Mississippi* Band *of Choctaw Indians v. Holyfield* (1989), 490 U.S. 30, 104 L. Ed. 2d 29, 109 S. Ct. 1597. In *Holyfield*, Native American Indian parents who were domiciled on an Indian reservation in Mississippi travelled approximately 200 miles off the reservation for the birth of their twins. They executed consent-to-adoption forms immediately after the births and then returned to the reservation. The State courts of Mississippi validated the adoptions over the objections of the parents' Indian tribe, which sought to intervene in the adoption proceeding. However, the United States Supreme Court held that the tribal court had exclusive jurisdiction over the custody proceeding, since the parents had been

domiciled on the reservation and the children took the domicile of their parents upon their birth. The Court held that in determining domicile, courts must look to uniform. Federal jurisprudence with respect to this term, and that courts cannot apply an inconsistent interpretation of domicile that might vary from State to State.

The majority acknowledges the general principles regarding domicile of a minor whose parent has died, leaving a surviving parent. As noted by the majority, under established common law, upon the death of Richard, the domicile of the children became that of Betty Jo, the surviving parent and legal custodian. (*People ex rel. Noonan v. Wingate* (1941), 376 Ill. 244, 249 (at common law upon the death of the father an infant took the domicile of its mother): 25 Am. Jur. 2d Domicile §§67, 70 (1966) (§67: upon the death of the parent to whom custody of a child has been awarded, the domicile of the child becomes that of the surviving parent: §70: upon the death of the father, the domicile of the minor becomes the domicile of the mother): Restatement (Second) of Conflict of Laws §22, Comment *b*, at 63 (1981) (upon the death of the parent who has been awarded legal custody of the child or with whom the child has been living, the child's domicile shifts to that of the other parent even though the latter is domiciled in another State).) Applying these principles to the instant case, the domicile of R.S. and S.S. is the same as that of their mother, *i.e.,* the Fort Peck reservation. Consequently, since this case is a child custody proceeding involving Indian children whose domicile

is an Indian reservation, the express language of section 1911(a) of the ICWA mandates that the tribe have exclusive jurisdiction over this action.

The majority believes that the children's domicile should not follow that of their mother, Betty Jo, because there are allegations that she has "abandoned" the children. However, under the terms of the ICWA and its jurisprudential interpretations by the United States Supreme Court, State laws pertaining to abandonment cannot be applied to determine a child's domicile under the Indian Child Welfare Act.

The Supreme Court held in *Holyfield* that a parent's actions cannot alter tribal court power to assert jurisdiction over a custody proceeding involving an Indian child who is a member of, or is eligible for membership in, the Indian tribe. (*Holyfield*, 490 U.S. at 51-53, 104 L. Ed. 2d at 48-49, 109 S. Ct. at 1609-11.) As a result, the Court held that parental actions amounting to abandonment *do not and cannot* divest a tribal court of jurisdiction. In so ruling, the *Holyfield* Court agreed with the reasoning of the Supreme Court of Utah in *In re Adoption of Halloway* (Utah 1986), 732 P.2d 962, 969-70, that even a finding of parental abandonment cannot be determinative of jurisdiction under the ICWA. (*Holyfield*, 490 U.S. at 51 n.26, 52-53, 104 L. Ed. 2d at 48 N.26,49, 109 S. Ct. at 1609 n.26, 1610.) The Court noted that the decision in *Halloway* was a "scholarly and sensitive opinion in what has become a leading case on the ICWA." (*Holyfield*, 490 U.S. at 52, 104 L. Ed. 2d at 49, 109 S. Ct. at 1610.) Quoting *Halloway*, the Court further stated:

> " '[State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents.'" *Holyfield*, 490 U.S. at 53, 104 L. Ed. 2d at 49, 109 S. Ct. at 1610, quoting *Halloway*, 732 P.2d at 97.

In *Halloway*, the court ruled that the domicile of the child born out of wedlock was that of his mother on the reservation and that under section 1911(a) of the ICWA the tribe therefore had exclusive jurisdiction over the adoption proceedings. The *Halloway* court refused to apply State law to defeat the tribe's jurisdiction on the basis that the child had been, arguably, abandoned by the mother after the child's removal from the reservation and placement in a non-Indian home. The court stated, "There certainly is nothing in the ICWA or its legislative history to suggest that state law controls if, in application, its subtleties bring it into conflict with the ICWA in ways that Congress apparently did not foresee. Under general supremacy principles, state law cannot be permitted to operate 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citation.] If it does, state law is preempted. [Citation.]" *Halloway*, 732 p.2d at 967.

Based upon *Holyfield's* endorsement of this reasoning in *Halloway*, it is readily apparent that Illinois' state-abandonment rules cannot be used to

deprive the Fort Peck tribal court of jurisdiction over this custody dispute, which involves two Indian children who are legally presumed to be domiciled on the tribal reservation. Yet this is precisely what the majority accomplishes in its opinion today.

In order to justify its position, the majority attempts to distinguish *Holyfield.* However, its reasoning does not withstand scrutiny. The majority suggests that *Holyfield* stands only for the rule that "the doctrine of abandonment cannot be used by Native American Indian parents as part of a scheme to facilitate adoption of their children by non-Indians while they remain domiciliaries of the reservation." (Slip op. at 9.) However, the Supreme Court in *Holyfield* condemned the State court's use of its own State-law abandonment principles in order to deprive the Indian tribe of its legitimate exercise of jurisdiction over the adoption dispute. Such efforts by a State-court system to use its own abandonment rules in order to oust the tribal court of jurisdiction are just as apparent in the instant cause as they were in *Holyfield.*

Application of abandonment principles in order to shift the children's domicile from their mother, Betty Jo, is directly contrary to and entirely inconsistent with congressional intent in enacting the Indian Child Welfare Act. As the Supreme Court observed in *Holyfield,* Congress intended the term "domicile" to have a uniform Federal meaning in order to curtail State authority over child custody proceedings involving Indian children, because it was perceived that, in the past, "the States and their courts

[were] partly responsible for the problem [the ICWA] intended to correct." (*Holyfield*, 490 U.S. at 45, 104 L. Ed. 2d at 44, 109 S. Ct. at 1606.) Another congressional concern was the substantial number of instances where social workers misunderstood Indian child-rearing methods as "abandonment," when in actuality the Indian parent's actions were simply a reflection of extended family child-rearing practices. (See *Holyfield*, 490 U.S. at 34-36, 104 L. Ed. 2d at 37-38, 109 S. Ct. at 1601.) Permitting State courts to decide whether an Indian parent has abandoned her children, in order to determine whether the children are domiciled in the State for the purpose of ascertaining tribal court or State-court jurisdiction over the child custody proceeding, could lead to a recurrence of the very abuses which the ICWA was designed to prevent. Given these considerations, I do not believe that Congress intended a State court to decide whether an Indian parent's so-called "abandonment" of her children should deprive the children from taking her domicile upon the death of their father.

Moreover, allowing the State court to decide whether Betty Jo has abandoned her children, in order to determine whether the Fort Peck tribe has exclusive jurisdiction over the Tubridys' adoption petition, creates an anomaly in procedure that is nowhere provided for in the ICWA. Whether Betty Jo has abandoned the children is an issue that properly arises in the context of the Tubridys' allegations that Betty Jo is not a fit parent. However, the majority essentially holds that Betty Jo's alleged abandonment

of the children may be considered twice-once in the context of a domicile hearing, and a second time in the context of a fitness hearing.

Under the ICWA, an allegation of parental unfitness must be proven beyond a reasonable doubt. (25 U.S.C. §1912(f) (1988).) However, in a traditional unfitness hearing under Illinois law, the proper standard is proof by clear and convincing evidence. (750 ILCS 50/1(D) (West 1992): see, *e.g., In re Adoption of Syck* (1990), 138 Ill. 2d 255.) Thus it is unclear which burdens of proof would apply in the instant proceedings. The majority does not explain to the circuit court whether the standard of clear and convincing evidence should apply for the "domicile/abandonment hearing" and whether the standard of proof beyond a reasonable doubt would apply for the "adoption/abandonment hearing." The majority has created an unwarranted, cumbersome, and illogical procedural course. There is nothing in the ICWA that demonstrates congressional intent to allow abandonment to be litigated on two separate occasions during the course of the proceeding, or to allow two different burdens of proof to apply to these proceedings.

In my view, Congress intended the concept of "domicile" to be a "well-defined operating system for effectuating tribal jurisdiction" even in instances where the Indian children lived a substantial distance from the tribal reservation and in all likelihood could not have either close, on-going physical contacts with their tribal relatives, or consistent, in-depth exposure to and education about their tribal heritage. (1976 Report on

Federal, State, and Tribal Jurisdiction, *reprinted in* Senate Report at 51-52.) This congressional intent to ensure that domicile would be given a wide and uniform interpretation leads to the conclusion that Betty Jo's children share her domicile upon the death of their father, and that principles of State law regarding "abandonment" cannot be utilized to shift the children's domicile away from that of their biological mother.

In fact, the legislative history of the ICWA reveals that Congress rejected an earlier version of the statute that would have required, as a prerequisite to tribal-court jurisdiction, that an Indian child not living on the tribal reservation have "significant contacts" with the tribe. A review of the original version of the ICWA, initially introduced as Senate Bill 1214, included a provision stating the following:

> "In the case of any Indian child who is not a resident of an Indian reservation or who is otherwise under the jurisdiction of a state, if said Indian child has significant contacts with an Indian tribe, no child placement shall be valid or given any legal force and effect, *** unless the Indian tribe with which such child has significant contacts has been accorded thirty days prior written notice of a right to intervene as an interested party in the child placement proceedings. In the event that the intervening tribe maintains a tribal court which has jurisdiction over child welfare matters,

> jurisdiction shall be transferred to such tribe upon its request unless good cause for refusal is affirmatively shown." Senate Bill 1214 §102(c), *quoted in* Senate Report at 4.

The bill further provided:

> "For the purposes of this Act, whether or not a nonreservation resident Indian child has significant contacts with an Indian tribe shall be an issue of fact to be determined by the court on the basis of such considerations as: Membership in a tribe, family ties within the tribe, prior residency on the reservation for appreciable periods of time, reservation domicile, the statements of the child demonstrating a strong sense of self-identity as an Indian, or any other elements which reflect a continuing tribal relationship." Senate Bill 1214, §102(f), *quoted in* Senate Report at 5.

These provisions that required an Indian child to have "significant contacts" with the tribe were deleted in subsequent legislative action. No reference to "significant Indian contacts" appears in versions of the ICWA that were proposed after Senate Bill 1214, and no reference is made to it in subsequent hearings before the House of Representatives. Rather, Congress considered a version that defines "Indian child" in the same manner as the definition currently given under the ICWA (25 U.S.C. §1903(4) (1988)),

and contains no requirement of "significant contacts" with a tribe anywhere in subsequent legislation.

In light of this legislative history, it would appear that Congress considered, and rejected, a doctrine that would have required the Indian child to have "significant contacts" with his or her member tribe in order to invoke tribal jurisdiction under the ICWA. I believe congressional rejection of the "significant contacts" test is an important indicator that Congress did not intend the ICWA to be limited by a doctrine that would require that an Indian child, in order to take the domicile of his surviving parent, must have had "significant contacts" with the surviving parent and the tribe. Yet this is remarkably similar to the conclusion of the majority in the present cause. The majority suggests that the children's domicile will follow that of their mother, in order to determine jurisdiction, only if the children have had significant contacts with their mother and their tribe. However, according to the majority, Betty Jo has only had "sporadic" involvement in the children's lives and the children have had virtually no contact with the Fort Peck tribe. Construing this lack of significant contacts as evidence of parental abandonment, the majority attempts to bolster the circuit court's jurisdiction over the parties' adoption dispute. The effort is fruitless, however; Congress never intended parental abandonment, or lack of significant contacts, to operate as a means by which to determine State-court jurisdiction over a custody battle involving Native American Indian children.

The majority further tilts the scale in favor of State-court jurisdiction by holding that there is "good cause" under section 1911(b) to retain the adoption proceeding in this State, assuming the tribal court has concurrent jurisdiction over the adoption dispute. The majority's ruling in this regard is particularly inappropriate and disturbing, since the parties have never had the opportunity to argue whether there is good cause to retain the matter in State court. The majority determines that the circuit court should retain jurisdiction under principles of "good cause," notwithstanding the complete and total failure and absence of any hearing, argument, evidence or finding with respect to the issue of good cause. However, the question of "good cause" to retain jurisdiction in Illinois does not even arise until the issue of the children's domicile has been resolved. Because this preliminary question of domicile has not yet been resolved, I disagree with the majority's premature determination that there is "good cause" for the Illinois circuit court to retain jurisdiction over the parties' adoption dispute.

I also depart from the majority's decision because of its refusal to consider the primary argument raised by the parties: the validity and scope of the existing Indian family doctrine. The majority's refusal to consider this question is particularly remiss because it has been extensively briefed before this court and was the primary issue resolved by the appellate court.

I believe the existing Indian family doctrine should be rejected by this court. The doctrine is

actually a judicially created prerequisite to the applicability of the ICWA. It is premised upon the notion that application of the ICWA is limited to proceedings seeking the removal of an Indian child from a recognizable existing Indian family unit, home or culture. Proponents of the doctrine rely on the ICWA's references to the removal of Indian children from their families and the breakup of Indian families as support for their position that the underlying purposes and goals of the ICWA are not served or advanced when there is no existing family to maintain or from which an Indian child is being removed. Opponents argue that the doctrine is directly contrary to the express language, purposes and goals of the ICWA, which include protecting Indian tribes as well as Indian families. See generally Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. Rev. 465 (1993).

I suggest that the better approach is to reject the existing Indian family doctrine. There is no provision in the ICWA requiring that an Indian child be born into or be living in an Indian family unit to be subject to its provisions. However much one might believe the ICWA should have been written that way, "[n]o amount of probing into what Congress 'intended' can alter what Congress said." (Emphasis omitted.) (*In re N.S.*, 474 N.W.2d at 100 n.* (Sabers, J., specially concurring).) Congress explicitly granted Indian tribes exclusive jurisdiction over child custody proceedings involving Indian children who are domiciliaries of a reservation and granted tribes presumptive jurisdiction in situations where the Indian children are not so

domiciled. 25 U.S.C. §1911 (1988); accord *Holyfield*, 490 U.S. at 36, 104 L. Ed. 2d at 38-39, 109 S. Ct. at 1601-02; Tellinghuisen, *The Indian Child Welfare Act of 1978: A Practical Guide with (Limited) Commentary*, 34 S.D. L. Rev. 660, 671 (1989).

I also reject the doctrine because of its potential for abuse in those instances where a State court mistrusts the Indian tribal court's ability to properly consider the "best interests" of the child in determining the child's custody arrangement. As one commentator has noted,

> "The notion that Native American tribal courts are more likely than state courts to neglect or inflict suffering on Native American children is grounded in suspicion, not in objective evidence. [With regard to the twin children whose adoption was at issue in *Holyfield*], the tribal court confirmed the placement of [the] *** twins with a nontribal family [as did the tribal court which decided the adoption petition with respect to the Indian child in *In re Adoption of Halloway* (Utah 1986), 732 P.2d 962]. Moreover, the assumption that tragic outcomes will more likely occur when jurisdiction lies with tribal courts rather than with state courts bespeaks a blindness both to the values and to the level of efficiency attained by the Euro-American child welfare system."

Carriere, *Representing the Native American*, 79 Iowa L. Rev. at 629.

In conclusion, I strongly emphasize that I neither decide nor suggest where the placement of the children should ultimately be. The only question we have been called upon to resolve is the limited legal one of jurisdiction, viz., which tribunal is the proper forum to determine whether the Tubridys should be permitted to adopt Betty Jo's children. Having established its right to exclusive jurisdiction to rule on the Tubridys' adoption petition, "we [should] defer to the experience, wisdom and compassion of the [Fort Peck] tribal court" to make an appropriate decision regarding the children's futures. (*Holyfield*, 490 U.S. at 54, 104 L. Ed. 2d at 50, 109 S. Ct. at 1611, quoting *Halloway*, 732 P.2d at 972.) I am confident that the tribal court would accord these proceedings the very serious consideration they deserve and would act with the utmost concern for the children's best interests.

For the reasons stated, I would affirm the judgment of the appellate court.

JUSTICES FREEMAN and NICKELS join in this dissent.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Nos. 2-93-0078 & 2-93-0101 cons.

In re ADOPTION of S.S. and R.S., Minors, (Leslie Scarlotte Tubridy and Patrick Tubridy, Petitioners-Appellees v. Betty Jo Ironbear, Respondent-Appellant; Fort Peck Assiniboine and Sioux Tribes, Appellants.	) Appeal from) The Circuit Court of Kane) County.) No. 92-F-1269)) Honorable Richard D) Larson,) Judge Presiding)

JUSTICE QUETSCH delivered the opinion of the court:

On November 24, 1992, petitioners, Leslie Scarlotte Tubridy and Patrick Tubridy, filed a verified petition for adoption in the circuit court of Kane County, seeking to adopt S.S. and R.S., the minor children of Ms. Tubridy's recently deceased brother and respondent, Betty Jo Ironbear. The petition alleged that Ironbear was an unfit person to have custody of S.S. and R.S. and sought to terminate Ironbear's parental rights. Shortly thereafter, Ironbear and the Fort Peck Assiniboine and Sioux Tribes (Fort Peck Tribes) filed separate motions to transfer the

case to the Fort Peck tribal court pursuant to section 1911 of the Indian Child Welfare Act of 1978 (ICWA or Act) (25 U.S.C. § 1911 (19__)). Following the denial of the motions, Ironbear and the Fort Peck Tribes separately petitioned this court for leave to appeal pursuant to Supreme Court Rule 306(a)(1)(v) (134 Ill. 2d Rule 306(a)(1)(v)). We granted the petitions and consolidated the appeals.

The issues raised for review are: (1) whether the trial court erred in concluding that the ICWA is inapplicable to this case, and (2) whether the trial court erred in determining that S.S. and R.S. were not domiciled on the Fort Peck tribal reservation.

We note that the record on appeal at this early stage of the proceedings consists essentially of the petition for adoption, the motions to transfer the case to the tribal court and a petition filed by Ironbear for an emergency order of protection pursuant to the Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 et seq. (West 1992)), alleging that the Tubridys and others concealed and abducted S.S. and R.S. At this point, there are no responses to either the adoption petition or Ironbear's petition for an order of protection. The motions to transfer are not supported by affidavit and no evidentiary hearing was conducted on these motions. Nonetheless, the parties have essentially acceded to this level of informality in establishing the relevant facts, and for the most part it appears that the significant facts are not substantially in dispute.

It is undisputed that Ironbear is a member of the Fort Peck Tribes. The children's father was a non-Indian, and he and Ironbear were never married. According to the Tubridys, the father established paternity in 1990 in separate proceedings in the circuit court of Kane County.

Apparently, in connection with these proceedings a joint parenting agreement was approved pursuant to which (according to Ironbear) the father was awarded physical care of the children for ten months of the year and Ironbear was awarded physical care for the summer months. In April 1992, the circuit court of Kane County granted the father's petition to terminate Ironbear's summer visitation. Ironbear states that the order terminating visitation was entered by default because she failed to appear. None of the orders in those separate proceedings appears in the record on appeal.

It appears both children resided in Illinois with their father and a paternal aunt (not Ms. Tubridy) at the time of the father's death in November 1992. In her motion to transfer, Ironbear states that S.S. and R.S. are members of the Fort Peck Tribes.

We note that the record reveals one significant matter of disagreement between Ironbear and the Tubridys. In the adoption petition, the Tubridys allege that Ironbear is a domiciliary of Kane County. In contrast, in her motion to transfer, Ironbear represents that she resides on the Fort Peck Indian Reservation in Poplar, Montana. The appellate arguments of both parties reflect the assumption that Ironbear resides on the reservation, and at oral argument the parties agreed that there is no factual dispute in this regard. Thus we conclude that the Tubridys may be viewed as having abandoned the allegation that Ironbear is domiciled in Kane County.

We first consider the trial court's determination that under the circumstances of this case the ICWA is inapplicable. Ironbear and the Fort Peck Tribes contend that this ruling is contrary to the language and policies of the ICWA. The Tubridys respond that the ICWA was designed to prevent the breakup of Indian families and that applying the ICWA

in the case at bar would not advance this objective, since, according to the Tubridys, the children are not part of an existing Indian family. Whether an exception to the applicability of the ICWA should be recognized in cases where the children are not part of an "Indian family," is a question of first impression in this State. As discussed below, courts in jurisdictions where the issues have been considered are sharply divided as to the propriety of this approach.

At issue in the present appeal is the applicability of section 1911 of the ICWA. (25 U.S.C. § 1911 (19__).) Section 1911(a) provides, in pertinent part, "[a]n Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." (25 U.S.C. § 1911(a) (19__).) Alternatively, pursuant to section 1911(b), "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe." (25 U.S.C. § 1911(b) (19__).) Pursuant to these provisions, the ICWA "provide[s] for exclusive tribal jurisdiction over custody proceedings involving Indian children who were domiciled or residing within a tribal reservation, and concurrent, but presumptively, tribal jurisdiction in other cases." In re Adoption of Crews (1992) 118 Wash. 2d 561, 568, 825 P.2d 305, 309.

The term "Indian child" means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4) (19__).) "Child custody proceeding" encompasses "foster care placement," "termination of parental rights," "preadoptive placement," and "adoptive placement," as those terms are variously defined. (25 U.S.C. § 1903(1) (19__). Accordingly, under the language of the statute, the applicability of the jurisdiction principles in section 1911 depends on the nature of the proceedings, the child's age and whether the child is (1) a member of the tribe, or (2) eligible for membership and the biological child of a member of the tribe. None of the applicable provisions impose any sort of threshold requirement that the proceedings involve an "Indian family" or that the child have any particular contact with the tribe or with his or her tribal heritage. The Tubridys seek that we impose such a limitation, based not on the language of the ICWA, but on the policies (as the Tubridys interpret them) that Congress had in mind in enacting the statute.

The Tubridys rely on a line of cases originating with In re Adoption of Baby Boy L. (1982), 231 Kan. 199, 643 P.2d 168, in which courts have deemed it appropriate to consult the policies underlying the ICWA and have held the ICWA to be inapplicable in circumstances where, in the court's view, applying the ICWA's provisions would not serve those policies. Baby Boy L. involved proceedings for the adoption of a child born out of wedlock to a non-Indian mother and an Indian father. The mother consented to the child's adoption on the day the child was born. On the same day, prospective adoptive parents filed a petition for adoption which, as later amended, sought to terminate the

father's parental rights. The Kiowa Tribe of Oklahoma sought to intervene, and the father and the tribe sought, inter alia, transfer of the case to the tribal court. Finding the ICWA inapplicable, the trial court denied the tribe's request to intervene and declined to transfer the case. The Supreme Court of Kansas affirmed on the basis of its view of Congress' objectives in enacting the ICWA:

> "[T]he overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother." (Emphasis added.) 231 Kan. at ___, 643 P.2d at 175.

The court took note of Congress' express findings and declaration of policy set forth in sections 1901 and 1902 of the ICWA. (Baby Boy L., 231 Kan. at ___, 643 P.2d at 175.) Section 1901(4) sets forth Congress' express finding "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." (25 U.S.C. § 1901(4) (19__).) Similarly, section 1902 declares:

> "[I]t is the policy of this Nation to

> protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture ***."
> 25 U.S.C. § 1902 (19__).

The Baby Boy L. court also identified various sections of the statute which, in the court's view, "reflect the underlying thread that runs throughout the entire Act to the effect that the Act is concerned with the removal of Indian children from an existing family unit and the resultant breakup of the Indian family." (231 Kan. at ___, 643 P.2d at 175.) Applying this reasoning, the court observed that, "In this case Baby Boy L. is only 5/16ths Kiowa Indian, has never been removed from an Indian family and so long as the mother is alive to object, would probably never become part of the [father's] or any other Indian family." (231 Kan. at ___, 643 P.2d at 175.) We note that, while in the case at bar the Tubridys advocate a rule that the ICWA does not apply where the child is not presently and has not in the past been raised in or exposed to an Indian environment, the Supreme Court of Kansas additionally considered the likelihood that the child might be raised in an Indian environment in the future.

In In re Adoption of D.M.J. (Okla. 1985), 741 P.2d 1386, the Supreme Court of Oklahoma found the Act inapplicable where a non-Indian mother who had been awarded custody of her child following her divorce from the child's Indian father sought to place the child for adoption without the

father's consent. The court noted that "[t]he Indian Child Welfare Act comes into play *** when we are confronted with the removal of Indian children from Indian families. The purpose of the Act is to promote the best interest of Indian children through promoting the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families." (741 P.2d at 1388.) The court concluded that "the ICWA applies only in those situations where Indian children are being removed from existing Indian family environments. Under the facts of this case where the Indian child since 1976 has been in the custody of her non-Indian mother, where the child is not being removed from the custody of an Indian parent, and is not being removed from an Indian environment, the ICWA does not apply." 741 P.2d at 1389.

In In re Adoption of Crews (1992), 118 Wash. 2d 561, 825 P.2d 305, an Indian mother, who had initially consented to the termination of her parental rights and the adoption of her natural child, later opposed the adoption and sought to have the order terminating her parental rights vacated on the basis of noncompliance with the ICWA. The mother's deposition testimony established that she was unaware of her Indian ancestry until after her child was born and had only researched her heritage in order to reinstate her parental rights. She also testified that her family did not regularly participate in Indian practices or events. The court examined the policies underlying the Act, noting that it was enacted "to counteract the large scale separations of Indian children from their families, tribes and culture through adoption or foster care placement, generally in non-Indian homes." (118 Wash. 2d at 567, 825 P.2d at 308.) The court specifically identified the tribal interest at stake:

"These separations not only affected Indian children and their parents, but also the various Indian tribes.

'Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people . . . .'

[Mississippi Band of Choctaw Indians v. Holyfield] [(1989)], 490 U.S. [30,] 34, 109 S. Ct. [1597,] 1600-01, quoting Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., at 193 (1978)." Crews, 118 Wash. 2d at 567-68, 825 P.2d at 309.

In light of these policies, the court observed:

"Neither [the mother] nor her family has ever lived on the Choctaw reservation in Oklahoma and there are no plans to relocate the family from Seattle to Oklahoma. [The child's father] has no ties to any Indian tribe or community and opposes [the child's] removal from his adoptive parents. Moreover, there is no allegation by [the Mother] or the Choctaw Nation that, if custody were returned to [the mother, the child] would grow up in an Indian environment. To the contrary, [the mother] has shown no substantive interest in her Indian heritage in the past and has given no indication this will change in the future.

> While [the child] may be an 'Indian child' based on the Choctaw Constitution, we do not find an existing Indian family unit or environment from which [the child] was removed or to which he would be returned. To apply ICWA in this specific situation would not further the policies and purposes of ICWA." (Emphasis added.) 118 Wash. 2d at 569, 825 P.2d at 310.

Again we note the court's emphasis not only on the child's past and present ties to the Indian community, but also on whether such ties might be established in the future. With these considerations in mind, the court carefully delimited its holding:

> "We are not unmindful that prior abusive child welfare practices may have cut off large numbers of persons from their Indian heritage. [Citation.] Furthermore, there may be instances where the application of ICWA would result in the placement of an Indian child back into an Indian environment. This is not the case before us. It is within the narrow circumstances presented by the specific facts of this case that we find ICWA not applicable. (Crews, 118 Wash. 2d at 571, 825 P.2d at 311.)

This is a facet of the decision which the Tubridys have failed to recognize, and one which, as we discuss further below, is of no small significance given the circumstances of the case at bar.

Several other courts have likewise declined to apply the Act based upon examination of its underlying policies and the conclusion that applying the Act would not advance these policies. See S.A. v. E.J.P. (Ala. Ct. App. 1990), 571

So.2d 1187; In re Adoption of T.R.M. (Ind. 1988), 525 N.E.2d 298; In re C.E.H. (Mo. Ct. App. 1992), 837 S.W.2d 947; In re S.A.M. (Mo. Ct. App. 1986), 703 S.W.2d 603; In re S.C. (Okla. 1992), 833 P.2d 1249.

A number of decisions, however, have questioned the soundness of this approach, particularly in light of the policy analysis undertaken by the United States Supreme Court in Mississippi Choctaw Indian Band v. Holyfield (1989), 490 U.S. 30, 104 L. Ed. 2d 29, 109 S. Ct. 1597. Holyfield involved the determination, for purposes of section 1911(a), of the domicile of twin children born out of wedlock to Indian parents. The parents were residents and domiciliaries of the Choctaw Reservation in Neshoba County, Mississippi, but traveled 200 miles away for the birth of their twins and then consented to the twins' adoption. After a final decree of adoption was issued in State court, the Choctaw tribe challenged the adoption, asserting that under the ICWA exclusive jurisdiction was vested in the tribal court. The resolution of the dispute depended on whether the twins were domiciled on the reservation. In connection with its determination of the domicile question, the Court examined the policies underlying the Act. The Court's observations emphasize Congress' concern not only with the interests of Indian parents and children but also with Indian tribes. For instance, the Court noted:

> "The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, e.g. S§ 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over nondomiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to

> petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with States) must *** be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." 490 U.S. at 49, 104 L. Ed. 2d at 47, 109 S. Ct. at 1609.

The Court concluded that Congress intended a uniform Federal law of domicile for the ICWA (490 U.S. at 47, 104 L. Ed. 2d at 45, 109 S. Ct. at 1608) which, as applied to the particular facts of the case, ascribed the mother's domicile (the Choctaw reservation) to the twins. (490 U.S. at 48, 104 L. Ed. 2d at 46-47, 109 S. Ct. at 1608.) This conclusion was not affected by the fact that the children were "voluntarily surrendered" by the mother, since "[t]ribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." 490 U.S. at 49, 104 L. Ed. 2d at 47, 109 S. Ct. at 1608-09.

In In re Adoption of Lindsay C. (1991), 229 Cal. App. 3d 404, 280 Cal. Rptr. 194, the California Court of Appeal relied in part on Holyfield's explanation of the Act's purposes in holding the Act applicable in proceedings for the adoption of the child by its stepfather. The child was born out of wedlock to a non-Indian mother and an Indian

father. Although the natural father had never had any meaningful contact with the child, the court observed that applying the Act "is in keeping with the tenor of Holyfield which stresses consideration of not only the wishes of the parents, but the well-being and interests of the child and the tribe." 229 Cal. App. 3d at 416, 280 Cal. Rptr. at 201.

In In re Baby Boy Doe (1993), 123 Idaho 464, 849 P.2d 925, the Supreme Court of Idaho rejected the trial court's use of an "Indian family" test in a case which, again, involved the recurrent fact pattern of a child born out of wedlock to an Indian father (who has had little or no contact with the child) and a non-Indian mother who sought to place the child for adoption over the father's objection. In light of Holyfield, the court noted that "[i]n this case, application of an Indian family requirement would allow the non-Indian mother to circumvent application of ICWA and the tribe's interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family. This would undermine the tribe's interest in its Indian children, which the Supreme Court recognized in [Holyfield]." (123 Idaho at ___, 849 P.2d at 931-32.) The court in Baby Boy Doe further stated:

> "We also reject application of an Indian family requirement because the provisions of ICWA do not contain any limitation based on where the child is located. Limiting ICWA to situations in which an Indian child is being removed from an existing Indian family is, therefore, a judicially created exception to ICWA. Congress passed ICWA to limit state court power by creating mandatory protective procedures and minimum evidentiary standards that must

be applied in child custody proceedings concerning Indian children. In light of the structure and nature of ICWA, it is inappropriate to use a judicially created exception to circumvent the mandates of ICWA." 123 Idaho at ___, 849 P.2d at 932.

See also In re Adoption of T.N.F. (Alaska 1989), 781 P.2d 973, 977-78 ("[T]hese judicially-created exceptions to coverage of ICWA are somewhat suspect in light of the Act's purpose of imposing federal procedural safeguards. State courts must be particularly hesitant in creating judicial exceptions to a federal act which was enacted to counter state courts' prejudicial treatment of Indian children and communities").

After Holyfield, the Supreme Court of South Dakota, which had previously approved of an "Indian family" requirement (Claymore v. Serr (S.D. 1987), 405 N.W.2d 650), reconsidered this position because "it is incorrect when assessing ICWA's applicability to a particular case, to focus only upon the interests of an existing family. [Citation.] Such a practice fails to recognize the legitimate concerns of the tribe that are protected under the Act." In re Adoption of Baade (S.D. 1990), 462 N.W.2d 485, 489, citing Tellinghuisen, The Indian Child Welfare Act of 1978: A Practical Guide With [Limited] Commentary, 34 S.D.L. Rev. 660, 666 (1989); see also In re Dependency and Neglect of N.S. (S.D. 1991), 474 N.W.2d 96, 100 n.6.

Having considered the reasoning of the various decisions discussed above, we conclude that the trial court erred in holding that the ICWA did not apply to the case at bar. We are troubled in no small measure by an approach which departs from the clear language of the statute based upon a generalized policy analysis. The provisions at issue are

unambiguous and the case at bar is undeniably within their scope. There is no dispute that the S.S. and R.S. are "Indian children" as defined by the ICWA. The proceedings here are "child custody proceedings" for purposes of section 1911(a) and because they involve termination of parental rights, the proceedings are also within the purview of section 1911(b). Thus, pursuant to the plain language of the Act, depending on where the children are domiciled, one or the other of these subsections will be applicable. Congress imposed no express requirement that children be part of an Indian family in order for these provisions to apply; this limitation on the scope of the ICWA is entirely a judicial creation with no basis in the language of the ICWA.

Where the language of a statutory provision is clear, a court must give it effect. (West v. Kirkham (1992), 147 Ill. 2d 1, 6.) Courts cannot declare that the legislature did not mean what the plain language of the statute imports. (Zimmer v. Village of Willowbrook (1993), 242 Ill. App. 3d 437, 443.) As we have recently observed, "[t]he cardinal rule of all statutory construction, to which other rules are subordinate, is that the true intent and meaning of the legislature must be ascertained and given effect; the language used in statutes is the primary source for determining the intent, and where the language used is certain and unambiguous, the proper function of the court is to enforce the statute as enacted." People v. Piat (1992) 234 Ill. App. 3d 262, 266. "When the statute is clear and unambiguous courts will give the language its plain and ordinary meaning, and will not read exceptions into the statute." (McCuen v. Peoria Park District (1993), 245 Ill. App. 3d 694, 697.) The analysis is not altered by the fact that Congress included express legislative findings and a policy statement in the ICWA. The policy section is

available for clarification of ambiguous provisions of the statute, but may not be used for the creation of ambiguity. Brown v. Kirk (1976), 64 Ill. 2d 144, 152.

Similar reasoning is reflected in a concurring opinion in In re Dependency and Neglect of N.S. (S.D. 1991), 474 N.W.2d 96:

> "While a statute should be construed according to its legislative intent when its terms are ambiguous, there is no need to reach back to what the legislature intended when a statute is unambiguous on its face. In fact, when a court ignores the clear provisions of a statute in reliance on what the court believes the legislature must have meant to say, the court is improperly engaging in judicial lawmaking.
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> * * *
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> 25 U.S.C. § 1903(4) states that an unmarried minor is an 'Indian child' for ICWA purposes if he is 'a member of an Indian tribe.' Since N.S. apparently is a member of the Cheyenne River Sioux Tribe, the provisions of ICWA apply to child custody proceedings involving N.S. There is simply no statutory requirement for N.S. to have been born into an Indian home or an Indian community in order to come within the provisions of ICWA, however much one might believe 25. U.S.C. § 1903(4) should have been

> written that way. No amount of probing into what Congress 'intended' can alter what Congress said, in plain English, at 25 U.S.C. § 1903(4)." (Emphasis in original.) N.S., 474 N.W.2d at 100-01 n.* (Sabers, J. specially concurring.)

See also In re D.M.J. (Okla. 1985), 741 P.2d 1386, 1390 (Hodges, J., dissenting.) ("The creation of a judicial exception such as the one urged by appellees and created by the majority is inappropriate where the Acts are clear and unambiguous").

In any event, even if it were appropriate to look beyond the plain language of the statute, our decision would be no different. We believe that the rule advocated by the Tubridys reflects an unduly narrow concept of the policies the ICWA was intended to advance. As the Supreme Court's decision in Holyfield clearly demonstrates, and as has been recognized by a number of courts, Congress enacted the ICWA not only to protect Indian children and parents, but also to protect the tribes themselves. Imposing an "existing Indian family" requirement under the circumstances of this case is "directly in conflict with the idea of tribal sovereignty and the policy of improving tribal ties reflected in ICWA." In re Adoption of Quinn (1993), 117 Or. App. 579, 583, 845 P.2d 206, 208 (en banc), petition for review allowed (1993), 316 Or. 142, 852 P.2d 838.

The Tubridys argue that Holyfield did not overrule cases approving the "existing Indian family" doctrine. While Holyfield did not involve the precise question of whether an existing Indian family is a threshold requirement to the ICWA's applicability, the Court's observations regarding the

policies underlying the Act are clearly applicable to the case at bar. The Tubridys also accuse Ironbear and the Fort Peck Tribes of extending the holdings of cases rejecting an Indian family test to "form an extreme position" that the Act gives "rights" to Indian tribes "equal" to the rights of both parents. The Tubridys do not support this statement by suggesting any meaningful distinction between those cases and the case at bar, and the position of Ironbear and the Fort Peck Tribes--that the Act should be applied as written--is hardly extreme. Nor do we find it particularly helpful to attempt to quantify "rights" given under the Act. "Congress has made the policy decision about the strength of the connection that a parent and child must have with the tribe for ICWA to apply--that the child be a member of the tribe or that the child be eligible for membership and the biological child of a member. [Citation.] It is not for state courts to add additional requirements." Quinn, 117 Or. App. at 584, 845 P.2d at 209.

Additionally, as support for the imposition of an existing Indian family requirement, the Tubridys suggest hypothetical scenarios where, they claim, literal application of the Act would lead to results unintended by Congress. The Tubridys' reliance on hypothetical situations only serves to invite us to create an overly broad judicial exception; if the facts of this case do not support the creation of a judicial exception, then we have no occasion at present to create one.

We further observe that our conclusion that the Act applies to the case at bar is, in fact, consistent with certain of the principal decisions the Tubridys rely on. In In re Adoption of Baby Boy L. (1982), 231 Kan. 199, ___, 643 P.2d 168, 175, the court specifically noted that the child would probably never become part of an Indian family.

Similarly, in In re Adoption of Crews (1992), 118 Wash. 2d 561, 825 P.2d 305, the Supreme Court of Washington expressly limited its decision to the facts before the court, noting that in other cases, "there may be instances where the application of ICWA would result in the placement of an Indian child back into an Indian environment." (118 Wash. 2d at 571, 825 P.2d at 311; see In re Adoption of M. (1992), 66 Wash. App. 475, ___, 832 P.2d 518, 521-22 (Where tribe had petitioned to intervene, seeking to place Indian child with paternal aunt, a Navajo living on the reservation, Crews did not apply).) The case at bar is just such a case. Ironbear is a member of the Fort Peck Tribes and, it appears, lives on the reservation. The children may well be placed in an Indian environment. This is precisely the objective the ICWA sought to facilitate.

We note that the Tubridys' argument reflects, in large measure, the assumption that if this case is transferred, Ironbear will necessarily prevail in the tribal court. At this early stage of the proceedings, our task is "to decide the legal question of who should make the custody determination concerning these children--not what the outcome of that determination should be." (Emphasis in original.) (Holyfield, 490 U.S. at 53, 104 L. Ed. 2d at 50, 109 S. Ct. at 1611.) We have no reason to doubt that if the case is transferred, the tribal court will decide it fairly. The Tubridys also express the concern that if the Act is applied according to its plain language, Indian tribes will invoke the Act indiscriminately for the sole purpose of increasing tribal membership. We cannot accept this premise. It is clear that Congress in enacting the Act, did not share the Tubridys' suspicion of the Indian community.

Finally, we note that the Tubridys have suggested in a cursory fashion, that application of the jurisdiction

provisions of the ICWA might in some cases violate the fifth, tenth, and fourteenth amendments to the United States Constitution. It would be imprudent for us to rule on significant constitutional issues on the basis of cursory and undeveloped arguments. We will not address the constitutional arguments. We therefore hold that the trial court erred in finding that the ICWA was inapplicable.

Having concluded that the ICWA applies to the case at bar, we turn to the question of whether the Act places jurisdiction in the tribal court. In addition to holding that the Act did not apply to the case at bar, the trial court alternatively found that the children were not domiciled on the Fort Peck Indian Reservation, so that section 1911(a) did not apply. Ironbear and the Fort Peck Tribes challenge the trial court's finding regarding domicile. Ironbear alternatively argues that even if the children were domiciled off the reservation, transfer to the tribal court is mandated by section 1911(b). See generally In re Armell (1990), 194 Ill. App. 3d 31.

As discussed above, in Mississippi Band of Choctaw Indians v. Holyfield (1989), 490 U.S. 30, 104 L. Ed. 2d 29, 109 S. Ct. 1597, the United States Supreme Court determined that Congress intended a uniform Federal law of domicile for the ICWA. (490 U.S. at 47, 104 L. Ed. 2d at 45, 109 S. Ct. at 1606-07.) Holyfield involved the issue of the domicile of illegitimate twins whose parents, domiciliaries of an Indian reservation, had traveled away from the reservation for their birth. In giving content to the term "domicile" for purposes of the ICWA, the court stated, "[t]hat we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles. *** Accordingly, we find it helpful to borrow established common-law

principles of domicile to the extent that they are not inconsistent with the objectives of the congressional scheme." (490 U.S. at 47-48, 104 L. Ed. 2d at 46, 109 S. Ct. at 1608.) The Court noted that under common-law principles domicile is not necessarily synonymous with residence, and one can reside in one place but be domiciled in another. 490 U.S. at 48, 104 L. Ed. 2d at 46, 109 S. Ct. at 1608.

The particular rule applicable to the twin children in Holyfield was explained as follows:

> "Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents. [Citation.] In the case of an illegitimate child, that has traditionally meant the domicile of its mother." 490 U.S. at 48, 104 L. Ed. 2d at 46, 109 S. Ct. at 1608.

Since the mother was a domiciliary of the reservation, so were the twins, notwithstanding the fact that they had never been physically present on the reservation since birth.

In the case at bar, we similarly look to common-law principles to determine the domicile of S.S. and R.S. The children resided with their father, and apparently were in his legal custody, at the time of his death. The fact that the father had established paternity of the children and had joint custody of them arguably complicates the question of the children's domicile prior to his death. In any event, it appears fairly certain that the children's domicile, prior to their father's death, would be the domicile of one or the other of their parents.

If the children's domicile was that of their mother, we cannot see how the death of the father would have any effect. On the other hand, it has been stated that at common law, "[a]t the death of the father, an infant took the domicile of its mother." (People ex rel. Noonan v. Wingate (1941), 376 Ill. 244, 249. See also R. Leflar, American Conflicts Law § 12, at 24 (1968) ("When the father dies, a child's domicile follows that of the surviving mother in the same fashion in which it previously followed the father's domicile").) It is of no consequence that the father was awarded joint custody of the children and that Ironbear's visitation rights had been terminated. As Ironbear notes, according to the Restatement (Second) of Conflicts of Laws S22, Commend d (1971):

> "A child's domicil, in the case of the divorce or separation of his parents, is the same as that of the parent to whose custody he has been legally given. *** Upon the death of the parent to whose custody the child has been awarded or with whom the child has been living, the child's domicil shifts to that of the other parent even though the latter is domiciled in another state."

The result should be no different upon the death of a custodial father whose right to joint legal custody was established in paternity proceedings. In the case at bar, although Ironbear's summer visitation rights were apparently terminated, her right to joint legal custody remained intact. However, pursuant to the Restatement rule, domicile would shift to Ironbear even if the children's father had sole custody.

Accordingly, even assuming, arguendo, that prior to the father's death the children shared his domicile, domicile shifted to that of Ironbear upon his death. Relying on Donlon v. Miller (1976), 42 Ill. App. 3d 64, the Tubridys attempt to resist this reasoning, arguing that these principles only create a presumption of domicile. Donlon involved a petition for the adoption of a child who had been left in the care of the petitioner from a week of age. When the child was six years old, the mother, who had previously only visited the child a couple of times during the first two years of the child's life, surreptitiously left the State with the child. Petitioner then filed an adoption petition in the circuit court of La Salle County, precipitating the natural mother's objection that the trial court lacked subject-matter jurisdiction and in personam jurisdiction over the mother and child. In the course of its analysis, the appellate court referred to the concept of domicile:

> "Although generally the domicile of an infant child is considered to be that of the child's parent or guardian (25 Am. Jur. 2d Domicil SS63-76 (1966)), we believe that [the child] could be said to have acquired the domicile of the petitioner under the peculiar circumstances of this case. For six years, since [the child] was a week old, she has been in the de facto care and custody of [petitioner]. *** If in fact there was a surreptitious removal of the child from the State by the defendant, this alone should not operate to change the status of the child so far as

domicile is concerned." (42 Ill. App. 3d at 71.)

Donlon involved a choice, for purposes of determining a child's domicile, between two living individuals, the natural mother and an individual with "de facto custody." We fail to see how the reasoning applies when a custodial parent dies and is survived by the other parent. In such a case, according to the rule recited above, the child's domicile becomes that of the surviving parent. We see no reason to depart from this principle. Holyfield permits resort to common-law domicile principles "to the extent that they are not inconsistent with the objectives of the congressional scheme." (490 U.S. at 48, 104 L. Ed. 2d at 46, 109 S. Ct. at 1608.) Section 1903(1) (defining "child custody proceeding") and section 1911(a) of the ICWA create a balance between State court and tribal court jurisdiction by excluding certain types of disputes, usually between parents, from the exclusive tribal jurisdiction. However, if a State court custody determination in a dispute between parents which is not subject to the ICWA could control the question of domicile, even after the death of the custodial parent, in subsequent custody proceedings otherwise subject to the ICWA, the balance would be sharply altered. In the present circumstances, we find application of the Restatement rule to be more in harmony with the purposes of the Act.

Accordingly, under section 1911(a) the Fort Peck tribal court has exclusive jurisdiction over this matter. In view of this determination, it is unnecessary to consider whether transfer would otherwise have been mandated under section 1911(b).

For the foregoing reasons, the judgment of the circuit court of Kane County is reversed, and the cause is remanded. Upon remand, the trial court is directed to order

that the case be transferred to Fort Peck Tribal Court in Poplar, Montana.

Reversed and remanded with directions.

BOWMAN, J., concurs.

COLWELL, J., dissenting:

I respectfully dissent. I would affirm the decision of the trial court on the application of the Indian Child Welfare Act of 1978 (ICWA or Act) (25 U.S.C. § 1911 (19__)) but I would apply different reasoning. The trial court's order states that "the children are not, and never have been domiciled on an Indian reservation." The court apparently concluded on this basis that the ICWA did not apply to these proceedings. I believe that the facts in this case lend themselves to an application of the "existing Indian family doctrine," which renders the ICWA inapplicable to the case at hand. This is a question of first impression in Illinois which deserves careful consideration not only of proper application of the ICWA, but the welfare of the children involved.

Congress adopted the ICWA with the express purpose:

> "[T]o protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture ***." 25 U.S.C. § 1902 (19__).

Legislative history cited in previous similar cases indicates that the overriding concern of Congress and other

proponents of the ICWA was to maintain the family and tribal relationships in existing Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. (See In re Adoption of Baby Boy L. (1982), 231 Kan. 199, ___, 643 P.2d 168, 175.) The ICWA was intended to counteract the large scale separation of Indian children from their family, tribe, and culture due to adoption or foster care placement in non-Indian homes. (Mississippi Band of Choctaw Indians v. Holyfield (1989), 490 U.S. 30, 49, 104 L. Ed. 2d 29, 47, 109 S. Ct. 1597, 1609.) The ICWA states that Congress specifically found:

"(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions: and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901 (4), (5) (19__).

I do not conclude that Congress intended the ICWA to dictate that the fate of children such as S.S. and R.S., who have had little contact with an Indian home or culture and have resided primarily with their father in another State,

should be determined by the Indian tribe. Rather, I believe the ICWA is meant to be applied when Indian children are being removed from an existing Indian environment.

These proceedings concern S.S., age 5 years, and R.S., age 9 years. It is apparently undisputed that Ironbear and the children are all enrolled members of the Fort Peck Assiniboine and Sioux Tribes. Ironbear briefly resided with the children and their father in the past, although she and the father never married. Ironbear had been awarded physical care of the children for two months out of the year under a 1990 joint parenting agreement. The children resided with their father in Illinois during the rest of the year. However, Ironbear's physical care was terminated on April 20, 1992. The children continuously resided with their father thereafter until his death on November 19, 1992. The Tubridys, the children's paternal aunt and uncle, took the children into their home after the father's death and immediately filed a petition for adoption.

The facts indicate that the children lived the predominant part of their lives with their non-Indian father in Illinois. Their history does not present the type of situation where the ICWA was meant to be applied since the children were not separated from an existing Indian family, tribe, or culture. Rather, the facts are sufficient to apply an existing Indian family exception since the appropriate tribunal would be determining whether the children would be removed, not from a reservation, tribe, or Indian family, but rather from the family members with whom they have resided and an environment which they now consider to be home.

I appreciate the concern that our decision should be based only on the application of the ICWA, not on the fear that the tribal court would conclude that the children should reside on the reservation. I cannot speculate on the

outcome of any proceeding in the tribal court nor by this dissent do I suggest a lack of confidence in the tribal court.

I do not believe that the existing Indian family doctrine departs from the clear language of the statute and is a judicial creation with no basis in the language of the ICWA. (See slip op. at 16.) The justification for applying the existing Indian family doctrine comes from the stated purpose of the statute itself (see 25 U.S.C. § 1902 (19__)), not from contrived derivations of the legislative findings or policy statements.

Several cases have determined that the ICWA was inapplicable because the adoption did not break up an existing Indian family. (In re Adoption of T.R.M. (Ind. 1988), 525 N.E. 2d 298; In re Baby Boy L., 643 P.2d at 175; In re S.A.M. (Mo. Ct. App. 1986), 703 S.W. 2d 603; In re S.C. (Okla. 1992), 833 P.2d 1249.) The Oklahoma Supreme Court recently endorsed the existing Indian family doctrine, stating that it is not a judicially created exception to the application of the ICWA; rather, it is simply outside the scope of the ICWA. (S.C., 833 P.2d at 1256.) The court concluded that the United States Supreme Court's decision in Holyfield should be confined to the domiciliary issues presented and did not overrule the existing Indian family doctrine, since "[e]xtending Holyfield to control placements occurring years after the child has already been away from its Indian family would not be consistent with the stated purposes of the ICWA." S.C., 833 P.2d at 1255.

The court in S.C. also noted that, in 1987, amendments were presented by the senate committee on Indian affairs which, if enacted, "would have made application of the ICWA mandatory regardless of whether the child had 'previously lived in Indian country, in an Indian cultural environment or with an Indian parent.'" (S.C., 833 P.2d at

1255, quoting S. 1976 100th Cong., 1st Sess., 133 Cong. Rec. § 18532, § 18533 (daily ed. Dec. 19, 1987) (proposed amendment to section 1903(1)).) The amendment failed, and the court in S.C. stated that Congress, being aware of the existing Indian family doctrine, refused to change the statutory language to eradicate this interpretation. (See S.C., 833 P.2d at 1255.) Restricting the application of the ICWA to an existing Indian family does, therefore, have support from previous case law, the language of the ICWA itself, and Congress' refusal to amend the ICWA.

The majority quotes In re Dependency and Neglect of N.S. for the argument that the statute does not require that the children were born into an Indian home or community in order to come within the provisions of the ICWA. Conversely, the policy statements and other relevant statutory language also do not provide that children residing in non-Indian homes who have had minimal contact with the reservation or Indian culture necessarily come within the purview of the ICWA. The facts in this case are different from the types of problems which were the catalyst for the ICWA since the children here would be adopted into the family with whom they currently reside, and such adoption would not involve the breakup of an existing Indian family.

I conclude that the ICWA does not apply to the case at bar; thus I would affirm the trial court. It should be noted that the trial court's order appears to base its decision on the fact that it found the children were not residing or domiciled on the reservation. In fact, if the ICWA did apply, I agree with the majority that domicile of the children would be established on the reservation under the language of Holyfield. (See slip op. at 25-26.) However, since I believe the ICWA should not apply in the case at hand, the issue of

domicile need not be determined for the disposition of this case.

APPENDIX C

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT KANE COUNTY, ILLINOIS

Leslie Scarlotte Tubridy	)
and Patrick Tubridy	)
Plaintiff	)
vs.	) Gen. No.92 F KA 1269
	)
Sandra Ann Sansaver,	) [Order]
Richard Joseph Sansaver	)Judge Larsen
and Betty Jo Iron Bear	)Filed December 22, 1992
Defendant(s).	)

This matter coming to be heard on respondents motion to transfer jurisdiction, counsel being present, argument being made and the Court being fully advised on the premises, the court finds that the children are not, and never have been domiciled on the Indian Reservation. It is hereby ordered:

1. The Indian Child Welfare Act does not apply to these proceedings;

2. The respondents' motions to transfer jurisdiction are denied.

Dated 12/22/92

Plaintiff's attorney: Bruce Strom
Defendants attorney: Kathryn McGowan Betcher
Other: Gary M. Beaudry
All attorneys present

APPENDIX D

Gary M. Beaudry
Special Prosecutor
Fort Peck Tribes
Poplar, Montana 59255
Phone: (406) 768-5557

IN THE CIRCUIT COURT

OF THE SIXTEENTH JUDICIAL CIRCUIT

KANE COUNTY, ILLINOIS

IN THE MATTER OF THE PETITION OF	)	
	)	
LESLIE SCARLOTTE TUBORIDY and	)	
PATRICK TUBORIDY, husband and wife	)	
Petitioners,	)	Case
vs.	)	
SANDRA ANN SANSAVER, a minor,	)	
RICHARD JOSEPH SANSAVER, a minor,	)	
BETTY JO IRON BEAR, all whom it may	)	
concern, and ILLINOIS DEPARTMENT OF	)	
CHILDREN AND FAMILY SERVICES,	)	
	)	
Defendants.	)	

MOTION TO TRANSFER JURISDICTION

Comes Now the Fort Peck Tribes, by and through its Attorney undersigned, and petitions the Court to transfer this action to the Fort Peck Tribal Court, Poplar, Montana, and to dismiss the state court proceeding, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. Section 1911(a). As grounds therefore, the tribes state:

1. The minor children involved in this proceeding are "Indian Children" as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. Sec. 1903(4), in that the children are under eighteen (18) years of age, and the child Richard Joseph Sansaver is a member of the Fort Peck Tribes or is eligible for membership in the Fort Peck Tribes, and the child Sandra Ann Sansaver is a member of the Fort Peck Tribes or is eligible for membership in the Fort Peck Tribes.

2. The Fort Peck Tribes are an "Indian Tribe" as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. 1903(8), and this fact is entitled to judicial notice by virtue of publication in the Federal Register, 48 Fed. Reg. 56862 (Dec. 23, 1983).

3. The Fort Peck Tribes as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. Section 1903(5) is the Tribe in which the children herein are eligible for membership.

4. This is a child custody proceeding as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. Section 1903(1), in that it involves foster care placement, termination of parental rights, pre-adoptive placement or adoptive placement.

5. The Indian Child Welfare Act of 1978, 25 U.S.C. Section 1911 (a), mandates that "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." In this

case the children's domicile follows the domicile of their parent, Betty Jo Iron Bear who is domiciled on the Fort Peck Indian Reservation.

6. The Fort Peck Tribes seeks to take jurisdiction of this proceeding, and to provide planning and placement for the above-named children.

WHEREFORE Petitioner prays the Court to transfer the above-captioned proceeding to the Fort Peck Tribal Court, Poplar, Montana, to dismiss the state court proceeding involving the above-named Indian children and to grant such other relief as the Court deems just and proper.

Respectfully submitted this 3rd day of December, 1992.

Gary Beaudry, Esq.ND#21164
Special Prosecutor
Fort Peck Tribes
P.O. Box 1027
Poplar, Montana 59255
Phone: (406) 768-5557

APPENDIX E

IN THE CIRCUIT COURT

FOR THE SIXTEENTH JUDICIAL CIRCUIT

KANE COUNTY, ILLINOIS

IN THE MATTER OF THE PETITION OF:	)
	)
LESLIE SCARLOTTE TUBORIDY AND PATRICK TUBORIDY, husband and wife,	)
	)
Plaintiffs,	)
	) **NO.**
vs.	) **FKA**
	)'92
SANDRA ANN SANSAVER, a minor, RICHARD JOSEPH SANSAVER, a minor, BETTY JO IRON BEAR, all whom it may concern, and ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)1269
	)
	)
	)
	)
	)
Defendants.	)

MOTION TO TRANSFER JURISDICTION

Defendant, BETTY JO IRON BEAR, by her attorneys, PRAIRIE STATE LEGAL SERVICE, INC., petitions the Court to transfer this action to the Fort Peck Tribal Court, Poplar, Montana, and to dismiss the state court proceeding,

pursuant to the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §1911(a), and in support states:

1. Petitioner resides on the Fort Peck Indian Reservation and is a member of the Fort Peck Assiniboine and Sioux Tribes ("Fort Peck Tribes").

2. Petitioner is the mother of SANDRA ANN SANSAVER, born 3/22/88 and RICHARD JOSEPH SANSAVER, born 4/15/84. Sandra Ann Sansaver and Richard Joseph Sansaver are the minor children involved in the adoption proceeding.

3. The minor children involved in this proceeding are "Indian Children" as defined by the ICWA, 25 U.S.C. §1903(4), in that the children are under eighteen (18) years of age, and the child Richard Joseph Sansaver is a member of the Fort Peck Tribes and the child Sandra Ann Sansaver is a member of the Fort Peck Tribes.

4. The Fort Peck Tribes are an "Indian Tribe" as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. 1903(8), and this fact is entitled to judicial notice by virtue of publication in the Federal Register, 48 Fed. Reg. 56862 (December 23, 1983).

5. This is a child custody proceeding as defined by ICWA, 25 U.S.C. §1903(1), in that it involves termination of parental rights, and adoptive placement.

6. The ICWA, 25 U.S.C. §1911(a) states that "an Indian Tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."

7. Domicile of minor Indian children is determined by the domicile of their parents. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. ___, 109 S. Ct. 1597, 1608 (1989).

8. Respondent to this action, Betty Jo Ironbear is the sole parent of these minor children. Because Respondent's domicile is with the Fort Peck Assiniboine and Sioux Tribes, the domicile of the minor children also lies with the Tribes.

9. The Fort Peck Tribal Court has exclusive jurisdiction over this matter under ICWA, 25 U.S.C. §1911(a).

WHEREFORE, defendant Betty Jo Ironbear respectfully requests that this matter be transferred to the Fort Peck Tribal Court.

Respectfully Submitted,
Kathryn McGowan Bettcher

PRAIRIE STATE LEGAL SERVICES
By: Kathryn McGowan Bettcher
Attorney for Defendant Betty Jo Ironbear
Denise L. Church, Managing Attorney
10 E. State Avenue, Suite 102
St. Charles, Il. 60174
(708) 232-9415

APPENDIX F

STATE OF ILLINOIS)
) SS:
COUNTY OF KANE)

IN THE CIRCUIT COURT

FOR THE SIXTEENTH JUDICIAL CIRCUIT

KANE COUNTY, ILLINOIS

LESLIE SCARLOTTE TUBORIDY and PATRICK TUBORIDY, Husband and Wife,	)
Plaintiffs,	) **No. F KA 92 1269**
vs.	) **merged with**
SANDRA ANN SANSAVER, a Minor, RICHARD JOSEPH SANSAVER, a Minor, BETTY JO IRON BEAR, All Whom It May Concern, and ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	) **F KA 92 1295**
Defendants.	)

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the HONORABLE RICHARD D. LARSON, Judge of said Court, on the 22nd day of December, A.D., 1992.

PRESENT:
PRAIRIE STATE LEGAL SERVICES, INC.,
By: MS. KATHRYN McGOWAN BETTCHER,
Attorney at Law,
appeared on behalf of Defendant
Betty Jo Iron Bear;

MR. BRUCE D. STROM
Attorney at Law,
appeared on behalf of Plaintiffs
Leslie and Patrick Tuboridy;

MR. GARY M. BEAUDRY,
Attorney at Law,
appeared on behalf of the Fort Peck
Indian Tribes, Poplar, Montana.

MARGARET E. EWEN, CSR, RPR, CM
Official Court Reporter

(WHEREUPON, the following
proceedings were had in
open court, to-wit:)

THE COURT: This is F KA 92 1269 merged with F KA 92 1295. 1269 is the petition of Tuboridy -- is that how it's pronounced -- T-u-b-o-r-i-d-y, versus Sansaver, S-a-n-s-a-v-e-r, and Betty Jo, J-o, Iron Bear and the Illinois Department of Children and Family Services.

Please introduce yourselves for the record, spelling your last names for the court reporter.

MR. STROM: Bruce Strom, S-t-r-o-m, on behalf of Petitioners, Leslie and Patrick Tuboridy.

MS. BETTCHER: Kathryn McGowan Bettcher,

B-e-t-t-c-h-e-r, on behalf of Respondent Betty Jo Iron Bear.

MR. BEAUDRY: Gary M. Beaudry, B-e-a-u-d-r-y, representing the Fort Peck Tribes, Poplar, Montana.

THE COURT: Okay. What do we have today?

MR. STROM: Judge, this is up on -- we, of course, filed a petition for adoption. After filing that petition, the Respondent entered an appearance and objection to jurisdiction. The lawyer for the tribe also filed an appearance and an objection to jurisdiction, and therefore today this is up on a hearing on the jurisdictional question.

THE COURT: Okay.

MR. BEAUDRY: Your Honor, representing the Fort Peck Tribes, I did receive a brief filed today by the Petitioner in this matter and was able to draft a response to Petitioner's brief this morning before court today, and I would like to file that at this time.

THE COURT: Very well.

MR. STROM: And I acknowledge a receipt of that earlier from Counsel, so I have no objection.

THE COURT: Okay. I have that, and I received a copy. In fact, I received five copies, four of which I will return to you --

MR. STROM: Thank you, Judge.

THE COURT: -- which you can use as scratch paper.

Okay. You may make any argument you wish to make, Mr. Beaudry, for the record.

MR. BEAUDRY: Thank you, Your Honor.

This case is an Indian Child Welfare Act case. The Act was promulgated for these matters. The Act was set forth for any case where an Indian child as defined under the Act is subject to a termination of parental rights action, pre-adoption placement, foster care placement, or where a petition for adoption is filed concerning the child.

These children, Sandra Ann Sansaver and Richard Joseph Sansaver, are enrolled members or enrollable members in the Fort Peck Indian Reservation in Poplar, Montana. The mother of the children is Betty Jo Iron Bear. She is also an enrolled member of the Fort Peck Tribes. Her parental rights have never been terminated. According to court records, she has -- her parental rights have never been terminated, and she has joint custody of the children with her deceased husband, Richard Sansaver. Upon the death of Richard Sansaver, the parties filed a petition for adoption. At that point, the Fort Peck Tribes filed a petition to transfer these proceedings and to transfer the children back to the Fort Peck Indian Reservation, filed under the Act.

The Act has several provisions. The first provision is applicable here, 25 U.S.C., Section 1911(a), in that it states that the tribes have exclusive jurisdiction, and also in any state court proceeding, the first issue for the Court to determine is whether the children

are -- reside or are domiciled on the Fort Peck Indian Reservation, are domiciled on that reservation. In this case, the children are domiciled on the reservation because their domicile follows the domicile of the mother, Betty Jo Iron Bear.

This is a well-established rule of law as set forth in the Mississippi Band of Choctaw Indians versus Holyfield case, a 1959 Supreme Court case. In that case, twin babies were born off the reservation. The parents were enrolled members of the reservation. They decided to adopt the children. They thought they would have a better chance of adopting the children if the children were born off the reservation, adopting the children out to non-Indians. In that case, both parents signed consent forms off the reservation consenting to the adoption of the twin babies.

The Holyfield court decided that it was an Indian Child Welfare Act case and that the tribe had the right to determine

whether or not those children can be adopted under that petition. This was not left for the state court determination. The issue of domicile was very important to that case. The Supreme Court said that any state court rule or any state court test to determine domicile was not applicable because the Act was a federal act and it was set for the reason of to defer adoption proceedings from state court to tribal reservations allowing the Indian people to proceed with making determinations whether or not that child should be adopted out.

The tribes have a right to their children. It's the only future that the tribes have. The right to the children and the interest in the children is equal to that of the parents, and therefore the tribe can intervene in an action and transfer jurisdiction.

THE COURT: Okay. Who wants to go next? Do you have anything to add?

MS. BETTCHER: I don't, Your Honor.

THE COURT: Okay. Mr. Strom?

MR. STROM: In response, I believe, first of all, the first question the Court should address is whether the Act applies at all. I believe the Act does not apply because this does not involve an Indian family. The purpose of the Act is to protect children who are domiciled, who reside on Indian reservations, from being taken by the Department of Children and Family Services and such other social agencies, children who are being neglected or abused. That was the purpose behind the Act, was to prevent the removal of children from where they were living.

And in this case, we have children --the one child -- there are two children involved here. The younger boy, Ricky Sansaver, was born here in Elgin, has lived here in Elgin his entire life. The other girl was born, lived briefly out in Montana, but moved here with father and mother to Elgin and has lived here basically her entire life. They have had relatively no contact

whatsoever with the Indian reservation. They have not lived on the Indian reservation. The children have gone to school here. I mean they have lived like any other children here in Elgin in the community. They have gone to school, gone to church. They have done different things here in the area.

This is not an Indian family as defined by the Act. These are Indian children because they are half Indian blood or less than half Indian blood, but otherwise they have not had contacts with the reservation, and in accordance with the cases we have cited, In Re the Matter of the Adoption of T.R.M. and Baby Boy L., the court is not required to apply the Act. The Act does not apply under these circumstances.

Furthermore, I believe that the court here in Kane County has had jurisdiction over other matters that have been before the Court before, and I believe that the Court brought over another case as well, that there was an order to bring it over, 90 F KA 82, wherein the mother was denied visitation here because of some of the extreme facts involved in this case, and, in fact, there is even a question as to whether the joint parenting order was terminated or not. I can't tell from Judge Nottolini's order. I can't read it that clearly. But in any event, the children have certainly had no contacts, no substantial contacts with the reservation at all, and the Act should not apply. Even assuming that counsel's argument that the Act should apply, Section 1911(a) is simply not the provision that would apply here.

The Holyfield case, the Supreme Court case, involved two Indian parents who lived on the Indian reservation entirely. They just left the Indian reservation just briefly to have -- to give birth to the children and wanted to place them for adoption. Then they moved back to the Indian reservation and always lived there. Certainly, there is no question but that they reside or are domiciled on the Indian reservation. Here that simply is not the case.

The children's domicile goes with the parent where they have been living, and they have been living here, one child his entire life, the other child virtually her entire life here in Elgin. So 1911(a) simply does not apply. 1911(b) would be the provision if the Act -- which I do not believe does apply -- if the Act did apply, it would be 1911(b), where the state court has concurrent jurisdiction and can exercise jurisdiction if one of the parties objects or if good cause is shown.

I believe that Mr. Sansaver clearly made it his intention to object to any jurisdiction. He left in his will -- he contacted a local attorney, Mark Schuster, here in the area, made it his express intention to not have the children have to go to the Indian reservation, live in an entirely different environment than they have been used to, to leave everything they were aware of, were familiar with, and the family they knew so well, and go to a reservation to a mother they have not seen.

Betty Jo Iron Bear has abandoned these children on several occasions and two years ago has not seen them since. They have had relatively no contact whatsoever with her, but instead have had contact with the extended family here in the area and have lived with one of the aunts here in town. So he expressed his objections obviously under the Act to having any of these proceedings taking place.

Furthermore, there is good cause. There are several cases cited in our response to indicate that good cause can be shown for looking at the best interests of the children, and the best interests of the children is not to uproot them from everything that they have known and to force them to go out to an environment which is entirely alien to them and to move them out there and change their entire proceedings. That would be very detrimental to obviously their emotional health, their psychological health, and we do not think that it is warranted under the Act or by law. And clearly it would be against their best interests.

And we have cited several cases, including a Montana Supreme Court case, In the Matter of M.E.M., which states that the best interest is the relevant standard to be used in determining placement of the children, and so I believe that there certainly is good cause based on all the extreme facts which are set forth in our motion to keep the jurisdiction here and to have a hearing on whether the mother is, in fact, unfit or not based on the allegations raised in our original verified petition for adoption and in our response to the motion for transfer of jurisdiction.

And finally there is a question under Section 1921 of the Act as to whether the state court should apply state law to an Indian custodian when they are afforded a higher protection. We have an Indian custodian here, one of the aunts who is Indian, and she currently has physical custody of the children. They resided with this aunt here in Elgin and clearly state law would afford her a higher standard of protection than moving everything out to Montana. And I believe even under 1921 that the state should retain jurisdiction and the hearing should be held here.

Obviously, many of the witnesses are here. All the people the children have lived with all their lives are here, school officials. Anybody who has had any contact with the children are here in Illinois. Other hearings have been held here in Illinois, and I believe that this matter should remain in Illinois.

THE COURT: Okay.

MR. BEAUDRY: Thank you, Your Honor.

THE COURT: Any response?

MR. BEAUDRY: I would like to respond whether the Act applies or not. Under Section 1903, there are definitions as to which pertains to the Act, and the adoption proceedings is a custody proceeding under the Act. Section 4, it says: "For the purpose of this act, except as may be specifically provided

otherwise, the term 'child custody proceedings' shall mean and include."

And then under Subsection 4, it says: "Adoptive placement, which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." Clearly, this case is an adoption proceeding. There is a petition for adoption filed. Additionally, Counsel sets forth the proposition that these children have only a 50 percent degree of Indian blood. The tribe has a right, implicit under the Act, to determine who is enrolled or enrollable on their tribe. Our tribal policy is that if a person with a degree of Indian blood of Assiniboine or Sioux of one quarter, 25 percent, is an enrolled member and afforded all rights and privileges of a tribal member.

Additionally, Counsel says that the children have never had contact with the tribe. This is absurd. The children have had contact. They have significant connections in that their mother is an enrolled member in the tribe and she is a resident within the exterior boundaries of the Fort Peck Indian Reservation.

THE COURT: Anything?

MS. BETTCHER: If I might, Your Honor, first, I would like to tender to you the Supreme Court case that Mr. Beaudry mentioned earlier, Mississippi Band of Choctaw Indians versus Holyfield. It's a 1989 case and is dispositive of the issues in this case. In that case, as you have heard some of the facts, the parents, Indian parents, both on the reservation became pregnant, determined that they wanted to adopt the children out to non-Indian parents. They had the children outside, off the reservation, 200 miles away, in a deliberate effort to circumvent the Indian Child Welfare Act.

The Supreme Court case found that if it domiciled the children, found that of the parents, and they were deciding this case, Your Honor, three years after the children had been born and had been placed with adoptive parents, these children had

never been on the reservation, and the Court found that the tribe in that case had jurisdiction over the adoption proceedings based on the fact that the children, when they were born and subsequent to their birth, were domiciled with the parents and the parents were domiciled on the Indian reservation.

So we believe that Section 1911(a), which provides that the Indian tribe shall have exclusive jurisdiction over these kinds of proceedings when there
is -- when there are children who are domiciled within the reservation, applies here.

I would also, if it would make it any easier for Your Honor, I do have a copy of the Indian Child Welfare Act for you to look at if it might make things a little bit clearer.

THE COURT: Sure.

MS. BETTCHER: Secondly, even if you were to determine, Your Honor, that 1911(a) did not apply and were subsequently looking at 1911(b) as to whether or not to transfer jurisdiction to these -- to the tribe, in this situation, good cause has very definite meaning. It's set out by the Bureau of Indian Affairs in the Federal Register. There were certain things that constitute good cause, and in an Illinois case -- it's not a Second District case but a First District Appellate Court case,
1990 -- the court held that the best interests of the child is not a proper standard for determining good cause. There are five very definite definitions of good cause. Best interest of the children is not one of those, and I would be happy to give you a copy of that case, also, and I have a copy for opposing counsel.

THE COURT: Okay.

MR. BEAUDRY: Additionally, Your Honor, on -- opposing counsel mentioned that 1921 -- Section 1921 of the Indian Child Welfare Act somehow precludes this court or is a means by which this court can determine not to transfer jurisdiction. I would argue that 1921 is not a jurisdictional statute and does

not apply in this case. What we're looking at here specifically is 1911(a), and I do believe that Holyfield completely disposes of that case.

And I would also note for the record, Your Honor, that the cases that are cited by opposing counsel in his response to our motions are all -- all predate the Supreme Court case, the 1989 case, and, in fact, this case came about specifically because of the case or the kinds of cases that Counsel has mentioned where the state court determined that they did not have to transfer jurisdiction. In the Supreme Court case, their intent is to comply with congressional intent.

And lastly, if I might, Your Honor, I would also like to note that at this time Betty Jo Iron Bear is, number one, the only parent. She was given joint legal custody with the father of the children. These parties were never married. That joint legal custody was never terminated by any court order of any kind, contrary to what counsel says. The visitation was terminated but not the joint legal custody, and I would also note that any wishes of Mr. Sansaver are complete hearsay, Your Honor, and should be inadmissible. We have no way of testing the credibility.

THE COURT: Well, neither one of you two counsels representing the mother in this case have appeared before me before, and I can only assume that you think I am either completely stupid or blind. Both of you have deliberately misrepresented the law before me, and you have deliberately misrepresented the facts of this case. Both of you have characterized the Holyfield case as dispositive of the facts of this case when the facts of this case are 180 degrees opposite the Holyfield case.

In the Holyfield case, both parents were members of the tribe. They left the reservation. They traveled approximately 200 miles from the reservation. The mother gave birth to the children. They had given advance written consents to the

adoption. It was obviously an effort on their part as members of the tribe to avoid the impact of this law that you are seeking to impose on today's proceedings. In this case, only one parent is a member of the tribe, so this automatic domicile only applies at best with half of the force that it applied in the Holyfield case.

One of you tells me as a matter of fact that the Holyfield children never resided on the reservation. The other one of you tells me that they did. Now, I don't know where you practice law or where you get away with this, but you are not going to get away with it in this courtroom, and to mis-cite cases and misrepresent what they mean and mischaracterize the facts of the cases when you can't even get your own stories straight is disgraceful.

And I don't know whether your client is here or not, but if she is, I can't help but wonder what she is thinking. This is a deplorable way to practice law. Maybe you think that us folks out here in Kane County can't read or are not possessed with enough intelligence and understanding to reason by analogy and to understand the way we are supposed to follow the law and decide our cases, but this is an insult to the Court to appear and make this kind of an argument and to misrepresent the facts of the cases that you are citing to the Court.

These children have been subject to the jurisdiction of Kane County in case No. 90 F KA 82 since February of 1990, and nobody came in then and said you have no authority to do anything about these kids. And there have been all these other legal proceedings going along, and now at this point we come in and make this kind of an argument.

These children are not domiciled within any reservation. They have been domiciled in Kane County, in accordance with Mr. Strom's representations. No one has told me they were false. They are not obviously false on their face, and it will be my finding that this Act does not apply in this case. Now that will

be today's court order, and the motion to transfer jurisdiction will be denied.

Prepare an order, Mr. Strom.

MR. STROM: Thank you.

(WHICH were all the proceedings had in the above-entitled cause.)

STATE OF ILLINOIS)
) SS:
COUNTY OF KANE)

I hereby certify that I reported stenographically all of the proceedings had at the hearing in the above-entitled cause, and that the above and foregoing is a true, correct, and complete transcript of my stenographic notes so taken at the time and place hereinbefore set forth.

MARGARET E. EWEN, CSR, RPR, CM
No. 084-002919
Official Court Reporter,
16th Judicial Circuit of
Illinois.